

BellSouth Telecommunications, Inc.
Legal Department
1600 Williams Street
Suite 5200
Columbia, SC 29201

patrick.turner@bellsouth.com

Patrick W. Turner
General Counsel-South Carolina

803 401 2900
Fax 803 254 1731

February 1, 2006

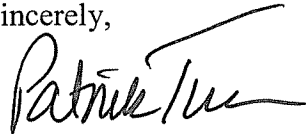
The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: BellSouth Telecommunications, Inc. v. NewSouth Communications Corp.
Docket No. 2004-63-C

Dear Mr. Terreni:

Enclosed for filing are the original and twenty-five copies of BellSouth Telecommunications, Inc.'s Direct Testimony of Patrick C. Finlen in the above-referenced matter. By copy of this letter, BellSouth is serving this testimony on all parties of record to this docket.

Sincerely,



Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
620007

RECEIVED
2006 FEB -1 PM 4:09
SC PUBLIC SERVICE
COMMISSION
RETURN DATE: OK D. Duke
SERVICE: OK

1 Bellsouth Telecommunications, Inc.
2 Direct Testimony of Patrick C. Finlen
3 Before the Public Service Commission of South Carolina
4 Docket No. 2004-63-C
5 February 1, 2006
6

RECEIVED
2006 FEB -1 PM 4:09
SC PUBLIC SERVICE
COMMISSION

7 Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH Bellsouth
8 Telecommunications, Inc. ("Bellsouth"), AND YOUR BUSINESS
9 ADDRESS.
10

11 A. My name is Patrick C. Finlen. I am currently an Assistant Director in the
12 Interconnection Services organization. My business address is 675 W. Peachtree
13 Street, Atlanta, Georgia, 30375.
14

15 Q. PLEASE SUMMARIZE YOUR BACKGROUND AND EXPERIENCE.
16

17 A. I received a Master of Arts Degree in Public and Private Management in 1994,
18 and a Bachelor of Arts Degree in Accounting in 1985 from Birmingham-Southern
19 College in Birmingham, Alabama. I also have an Associate of Science degree in
20 Data Processing from Jefferson State Junior College in Birmingham, Alabama. I
21 began employment with South Central Bell in 1977, and have held various
22 positions in the Network Operations, Consumer Forecasting, Marketing, and

1 Customer Markets Wholesale Pricing Departments before assuming my current
2 responsibilities in the Interconnection Services Marketing Department.

3

4 Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?

5

6 A. The purpose of my testimony is to present evidence that supports BellSouth's
7 position in this docket. BellSouth's legal position is briefly summarized in its
8 Complaint and Request for Summary Disposition ("Complaint") that was filed
9 with the Commission on March 5, 2004, and it will be thoroughly addressed in
10 BellSouth's post-hearing brief if one is necessary.

11

12 Q. PLEASE BRIEFLY EXPLAIN HOW YOUR DIRECT TESTIMONY IS
13 ORGANIZED.

14

15 A. My direct testimony is organized in the following manner:

16

17 First, I provide a brief summary of BellSouth's position and the relief
18 BellSouth is requesting from the Commission;

19

20 Second, I explain the events that led to the dispute that is the subject of
21 this docket;

22

1 Third, I explain BellSouth's concerns regarding NewSouth's EEL self-
2 certifications (although, as explained below, BellSouth is not required to
3 demonstrate any such "concern" in order to conduct an audit of
4 NewSouth's EELs);

5
6 Fourth, I explain that NewSouth is wrong when it suggests that BellSouth
7 routinely requests EEL audits; and

8
9 Fifth, I explain why NewSouth's concerns regarding BellSouth's selection
10 of an auditor are unfounded.

11
12 **I. BRIEF SUMMARY OF BELL SOUTH'S POSITION**
13 **& RELIEF REQUESTED**
14

15 Q. COULD YOU BRIEFLY SUMMARIZE BELL SOUTH'S POSITION IN THIS
16 PROCEEDING?

17
18 A. Yes. NewSouth and BellSouth negotiated and voluntarily entered into the
19 Interconnection Agreement ("the Agreement") under which they are operating,
20 and this Commission approved the Agreement. The negotiated Agreement allows
21 NewSouth to convert its special access circuits (to which tariffed prices apply) to
22 combinations of unbundled network elements ("UNEs") known as "EELs"¹ (to

¹ "EEL" stands for "enhanced extended link." While not an unbundled network element itself, an EEL is comprised of an unbundled loop (including

1 which much lower TELRIC prices apply), but only so long as NewSouth uses
2 those EELs to provide a “significant amount of local exchange service.” The
3 Agreement also allows NewSouth to order new EELs, but only so long as
4 NewSouth uses those EELs to provide a “significant amount of local exchange
5 service.” The Agreement requires NewSouth to self-certify compliance with the
6 “significant amount of local exchange service” criteria prior to converting special
7 access circuits to EELs and prior to ordering new EELs.

8
9 The Agreement allows BellSouth to audit any of NewSouth’s EELs for
10 compliance with its self-certifications. To the extent that NewSouth self-certifies
11 under one of three “safe harbors” (which the Parties commonly refer to as Option
12 1, Option 2, and Option 3) referenced in Attachment 2, Section 4.5.1.2 of the
13 Agreement,² the only express qualifications of BellSouth's audit rights are that:
14 (1) BellSouth provides NewSouth 30 days' notice of the audit; (2) the audit is at
15 BellSouth’s sole expense; and (3) unless an audit finds non-compliance with
16 specified matters, BellSouth may audit NewSouth’s records not more than once in
17 any twelve month period.

18
19 To the extent that NewSouth self-certifies under what the parties refer to as
20 “Option 4” (which is described in Attachment 2, Section 4.5.2.1 of the

multiplexing/concentration equipment) and unbundled dedicated transport. *Net 2000 Communications, Inc. v. Verizon*, 17 FCC Rcd. 1150 at ¶3 (2001).

² These three “safe harbors” are incorporated by express reference to Paragraph 22 of the FCC’s June 2, 2000 *Supplemental Order Clarification*, which I address later in my testimony.

1 Agreement),³ BellSouth may conduct an audit either before filling NewSouth's
2 order or after filling NewSouth's order. If BellSouth conducts an audit before
3 filling the order, it must do so subject to the requirements for audits as set forth in
4 the Federal Communications Commission's ("FCC's") June 2, 2000
5 *Supplemental Order Clarification* "except as expressly modified herein." If
6 BellSouth conducts an audit after filling the order, the only express qualifications
7 of BellSouth's audit rights are the same as those discussed above: (1) BellSouth
8 provides NewSouth 30 days' notice of the audit; (2) the audit is at BellSouth's
9 sole expense; and (3) unless an audit finds non-compliance with specified matters,
10 BellSouth may audit NewSouth's records not more than once in any twelve month
11 period.

12
13 Q. TO WHAT EXTENT ARE THE AUDIT PROVISIONS THAT ARE UNIQUE
14 TO OPTION 4 AT ISSUE IN THIS PROCEEDING?

15
16 A. The audit provisions that are unique to Option 4 are largely academic to the issues
17 before the Commission in this proceeding. NewSouth denies that it has self-
18 certified any circuits pursuant to Option 4 and claims that "[a]ll of NewSouth's
19 circuits were converted pursuant to the second self-certification option"⁴
20 NewSouth, therefore, "denies that any eligibility criteria other than those

³ This provision describes a fourth "safe harbor" that is not found in the FCC's *Supplemental Order Clarification*. Instead, this is a "safe harbor" that the parties negotiated among themselves.

⁴ See NewSouth's Answer to BellSouth's Complaint at p. 11, ¶9.

1 appropriate under Option 2 (requiring 10 percent local usage) apply to the circuits
2 at issue in this proceeding.”⁵

3
4 While BellSouth does not agree that NewSouth has never self-certified under any
5 option other than Option 2, we do agree that the vast majority of NewSouth’s self-
6 certifications have been pursuant to Option 2. Accordingly, the audit provisions
7 associated with Options 2 (which are set forth in Attachment 2, Section 4.5.1.5 of
8 the Agreement) are the ones that are relevant in this proceeding.

9
10 Q. PLEASE CONTINUE WITH YOUR SUMMARY OF BELL SOUTH’S
11 POSITION.

12
13 A. NewSouth has converted approximately 800 circuits in South Carolina from
14 special access to EELs, and BellSouth’s record indicates that NewSouth certified
15 these conversions under Option 2. In addition to these conversions, NewSouth
16 also has approximately 680 new EEL circuits in South Carolina. BellSouth has
17 sought to audit NewSouth’s EELs in strict accordance with the language of the
18 Agreement, but NewSouth has refused the audit. NewSouth has blocked the audit
19 because BellSouth has not *first*: (1) “demonstrated a concern” regarding circuit
20 non-compliance with the self-certification NewSouth provided in order to qualify
21 for the conversions under the Agreement; (2) linked its “concern” or “concerns”
22 to each and every converted circuit to be audited; (3) confirmed that it seeks to
23 audit only those circuits for which such linkage is demonstrated; (4) demonstrated

⁵ *Id.*

1 that its requests are not routine; and (5) hired a suitably “independent auditor” to
2 conduct the audit “in accordance with AICPA⁶ standards.”

3
4 No such pre-conditions to the audit requested by BellSouth appear in the
5 Agreement’s EELs audit provisions, or anywhere else in the Agreement the
6 parties negotiated. But, this has not stopped NewSouth from blocking the audit
7 anyway.

8
9 To support its refusal to allow BellSouth to conduct an audit, NewSouth relies on
10 certain provisions of the FCC’s *Supplemental Order Clarification*, which
11 NewSouth claims are incorporated by reference into the Agreement by virtue of a
12 generic “compliance with all laws” clause found in the General Terms &
13 Conditions section of the Agreement. I am not a lawyer, and I defer to
14 BellSouth’s attorneys regarding the legal merits of NewSouth’s positions, but as
15 explained below, I did participate in the negotiations leading to the Agreement the
16 parties entered into, and I will provide testimony regarding the timing of these
17 FCC Orders in relation to the execution of the Agreement by the parties.

18
19 NewSouth's refusal to honor its contractual audit commitments has now caused
20 BellSouth to seek enforcement of its audit rights before this Commission. It is
21 time for NewSouth's South Carolina EELs to be audited as expressly agreed. In
22 South Carolina, this will only happen upon order of this Commission which
23 BellSouth, accordingly, seeks.

⁶ “AICPA” stands for American Institute for Certified Public Accountants.

1

2 Q. WHAT RELIEF IS BELL SOUTH SEEKING IN THIS PROCEEDING?

3

4 A. As set forth in more detail in BellSouth's Complaint, BellSouth is seeking an
5 order from this Commission that:

6

7 (1) finds that NewSouth has breached its obligations under the
8 Interconnection Agreement by refusing to allow BellSouth to
9 conduct an audit of NewSouth's EEL circuits; and

10

11 (2) compels NewSouth to allow BellSouth's auditor to conduct the
12 audit, within 30 days of the Commission's order in this matter, of
13 NewSouth's EELs.

14

15 **II. EVENTS LEADING UP TO THIS DISPUTE**

16

17 Q. COULD YOU EXPLAIN HOW YOUR DISCUSSION OF THE EVENTS
18 LEADING UP TO THIS DISPUTE IS ORGANIZED.

19

20 A. Yes. First, I will explain how the FCC's *Supplemental Order* came about. Next,
21 I will discuss how the FCC's *Supplemental Order Clarification* upon which
22 NewSouth relies came about. Then, I will discuss the relevant language in the
23 Agreement the parties negotiated and entered into after the FCC issued these two

1 Orders. Next, I will discuss the EELs that NewSouth has converted pursuant to
2 the Agreement. Finally, I will address NewSouth's refusal to permit BellSouth to
3 audit NewSouth's EELs.

4
5 **A. The FCC's Supplemental Order**

6
7 Q. PLEASE EXPLAIN HOW THE FCC'S *SUPPLEMENTAL ORDER* CAME
8 ABOUT.

9
10 A. In 1999, the FCC issued an Order responding to the Supreme Court's January
11 1999 decision that overturned many aspects of the unbundling rules the FCC had
12 previously promulgated.⁷ In that Order, the FCC concluded that any requesting
13 carrier was entitled to obtain existing combinations of loops and transport
14 between the end user and the incumbent LEC's serving wire center on an
15 unrestricted basis at UNE prices.⁸

16
17 Many parties petitioned the FCC to reconsider various portions of that Order and,
18 in response to those petitions, the FCC issued its *Supplemental Order* on
19 November 24, 1999.⁹

⁷ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 1724 at ¶1 (November 5, 1999).

⁸ *Id.* at ¶486.

⁹ Supplemental Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 1760 (November 24, 1999). Exhibit PCF-1 to my Direct Testimony is a copy of the *Supplemental Order*.

1

2 Q. DID THE *SUPPLEMENTAL ORDER* ADDRESS THE PORTIONS OF THE
3 1999 ORDER THAT YOU JUST MENTIONED?

4

5 A. Yes. In the *Supplemental Order*, the FCC modified its prior conclusion “to now
6 allow incumbent LECs to constrain the use of combinations of unbundled loops
7 and transport network elements as a substitute for special access service subject to
8 the requirements of this Order.”¹⁰

9

10 The FCC held that this constraint “does not apply if an IXC uses combinations of
11 unbundled loop and transport network elements to provide a significant amount of
12 local exchange service, in addition to exchange access service, to a particular
13 customer.”¹¹ It further held that this constraint “therefore does not affect the
14 ability of competitive LECs to use combinations of loops and transport (referred
15 to as the enhanced extended link) to provide local exchange service.”¹² The FCC
16 further stated: “we will presume that the requesting carrier is providing
17 significant local exchange service if the requesting carrier is providing all of the
18 end user’s local exchange service,” and “[b]ecause we intend the constraint we
19 identify in this order to be limited in duration, we do not find it to be necessary for
20 incumbent LECs and requesting carriers to undertake auditing processes to

¹⁰ *Id.* at ¶4.

¹¹ *Id.* at ¶5.

¹² *Id.*

1 monitor whether or not requesting carriers are using unbundled network elements
2 solely to provide exchange access service.”¹³

3
4 **B. The FCC’s Supplemental Order Clarification**

5
6 Q. PLEASE EXPLAIN HOW THE FCC’S *SUPPLEMENTAL ORDER*
7 *CLARIFICATION* CAME ABOUT.

8
9 A. On June 2, 2000, the FCC issued its *Supplemental Order Clarification*,¹⁴ which
10 clarified certain issues from the *Supplemental Order* regarding the “ability of
11 requesting carriers to use combinations of unbundled network elements to provide
12 local exchange and exchange access service prior to our resolution of the *Fourth*
13 *FNPRM*.”¹⁵

14
15 In the *Supplemental Order Clarification*, the FCC allowed competitive local
16 exchange carriers (“CLECs”) to obtain EELs upon self-certification that a
17 significant amount of local exchange service would be provided over the EEL
18 combinations.¹⁶ The FCC also established three “safe harbors” that a CLEC can
19 use to demonstrate its compliance with the *Order’s* “significant amount of local
20 exchange service” requirement,¹⁷ and it granted the ILECs the right to audit the

¹³ *Id.* at n. 9.

¹⁴ Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 9587 (June 2, 2000). Exhibit PCF-2 to my Direct Testimony is a copy of the *Supplemental Order Clarification*.

¹⁵ *Id.* at ¶ 1.

1 circuits after conversion to verify compliance with the “significant amount of
2 local exchange service” requirement.¹⁸

3
4 In the *Supplemental Order Clarification*, the FCC also stated that “[i]n order to
5 confirm reasonable compliance with the local usage requirements in this Order,
6 we also find that incumbent LECs may conduct limited audits only to the extent
7 necessary to determine a requesting carrier’s compliance with the local usage
8 options.”¹⁹

9
10 The FCC also stated that “in many cases, . . . interconnection agreements already
11 contain audit rights,” and it stated “[w]e do not believe that we should restrict
12 parties from relying on these agreements.”²⁰

13
14 **C. The Agreement.**

15
16 Q. WERE YOU INVOLVED IN NEGOTIATING THE AGREEMENT UNDER
17 WHICH NEWSOUTH AND BELL SOUTH CURRENTLY ARE OPERATING?

18
19 A. Yes, I was directly involved in the negotiation of the Agreement.
20

16 *Id.*

17 *Id.* at ¶22.

18 *Id.* at ¶ 1

19 *See Supplemental Order Clarification*, ¶ 29

20 *Id.*

1 Q. WERE NEWSOUTH AND BELL SOUTH AWARE OF THE FCC'S
2 *SUPPLEMENTAL ORDER CLARIFICATION* WHILE THEY WERE
3 NEGOTIATING THE AGREEMENT?

4
5 A. Yes. The *Supplemental Order Clarification* was released before NewSouth and
6 BellSouth entered into the Agreement. The parties discussed the Agreement
7 during negotiations and, as I will explain below, with regard to Options 1, 2, and
8 3, the Agreement expressly incorporates Paragraph 22 of the *Supplemental Order*
9 *Clarification* and it expressly allows NewSouth to self-certify "in the manner
10 specified by paragraph 29" of the *Supplemental Order Clarification*. No other
11 provisions of the *Supplemental Order Clarification* are mentioned in any
12 language that addresses Options 1, 2, and 3.

13
14 The Agreement goes on to set forth the criteria for complying with Option 4, and
15 it allows BellSouth to conduct an audit before filling an order that is self-certified
16 under Option 4. The Agreement provides that this type of Option 4 audit "shall
17 be subject to the requirements for audits as set forth in the June 2, 2000 Order,
18 except as expressly modified herein." This language is unique to the section of
19 the Agreement that addresses a front-end audit of a self-certification under Option
20 4 – this language does not appear in any other section that addressed EELs.

21
22 Q. WHAT IS THE EFFECTIVE DATE OF THE AGREEMENT?

23

1 A. May 18, 2001 (after the release of the *Supplemental Order Clarification*).

2

3 Q. WHAT IS THE GEOGRAPHIC SCOPE OF THE AGREEMENT?

4

5 A. NewSouth and BellSouth entered into the Agreement to govern their relationship
6 in South Carolina and each of the remaining eight states in BellSouth's operating
7 territory.

8

9 Q. WAS THE AGREEMENT ARBITRATED BY THIS OR ANY OTHER STATE
10 COMMISSION PURSUANT TO SECTION 252 OF THE FEDERAL
11 TELECOMMUNICATIONS ACT OF 1996 ("THE FEDERAL ACT")?

12

13 A. No. The Agreement was not the subject of any arbitration proceedings. Instead,
14 NewSouth and BellSouth negotiated and voluntarily entered into the Agreement.
15 The Agreement was filed with this Commission, and it was approved in
16 accordance with section 252(e) of the federal Act.²¹

17

18 Q. DOES THE AGREEMENT CONTAIN PROVISIONS ADDRESSING
19 NEWSOUTH'S ABILITY TO ORDER EELS FROM BELL SOUTH?

20

21 A. Yes. The Agreement provides: "Where necessary to comply with an effective
22 FCC and/or State Commission order, or as otherwise mutually agreed by the

²¹ Exhibit PCF-3 to my Direct Testimony is a copy of the Commission's Directive Sheet documenting the Commission's approval of the Agreement.

1 Parties, BellSouth shall offer access to loop and transport combinations, also
2 known as the Enhanced Extended Link (“EEL”) as defined in Section 4.3
3 below.”²²

4
5 Q. DOES THE AGREEMENT CONTAIN PROVISIONS ADDRESSING
6 NEWSOUTH’S ABILITY TO CONVERT SPECIAL ACCESS CIRCUITS TO
7 EELS?

8
9 Yes. The Agreement allows NewSouth to convert its special access circuits (to
10 which tariffed prices apply) to EELs (to which much lower TELRIC prices
11 apply), but only so long as NewSouth uses those EELs to provide a “‘significant
12 amount of local exchange service’ (as described in Section 4.5.2 below), in
13 addition to exchange access service, to a particular customer.

14
15 Q. DOES THE AGREEMENT DEFINE THE TERM “SIGNIFICANT AMOUNT
16 OF LOCAL EXCHANGE SERVICE?”

17
18 A. Yes. To define the term “significant amount of local exchange service,” the
19 Agreement expressly references paragraph 22 of the FCC’s *Supplemental Order*
20 *Clarification*.²³ Specifically, the Agreement provides that “[t]he Parties agree to
21 incorporate by reference paragraph 22 of the June 2, 2000 [*Supplemental Order*

²² Agreement, Att. 2, § 4.2. Exhibit PCF-4 to my Direct Testimony is a copy of the General Terms and Conditions of the Agreement and of the EEL provisions of Attachment 2 to the Agreement.

²³ Agreement, Att. 2, § 4.5.2.

1 *Clarification*],” which provides three scenarios under which a CLEC may self-
2 certify compliance with the “significant amount of local exchange service”
3 requirement.²⁴ These are commonly referred to as Option 1, Option 2, and Option
4 3. Thus, the Agreement requires NewSouth to self-certify compliance with the
5 “significant amount of local exchange service” criteria prior to converting special
6 access circuits to EELs.²⁵

7
8 The parties also negotiated another “safe harbor” that is not described in the
9 *Supplemental Order Clarification*. This option, which the parties commonly refer
10 to a “Option 4,” is described in Attachment 2, Section 4.5.2.1 of the Agreement.
11 As I explained earlier, Option 4 and the audit provisions that are unique to Option
12 4 are largely academic to the issues before the Commission in this proceeding.

13
14 Q. DOES THE AGREEMENT ADDRESS THE SUBJECT OF EEL AUDITS?

15
16 A. Yes. The Agreement allows BellSouth to audit NewSouth’s records “in order to
17 verify the type of traffic being transmitted over” any of NewSouth’s EELs.²⁶
18 Specifically, this section states:

19 BellSouth may, at its sole expense, and upon thirty (30) days
20 notice to NewSouth, audit NewSouth's records not more than once
21 in any twelve month period, unless an audit finds non-compliance

22).²⁴ Agreement, Att. 2, § 4.5.1.2 (citing *Supplemental Order Clarification* ¶

²⁵ Agreement, Att. 2, § 4.5.1.

²⁶ Agreement, Att. 2, § 4.5.1.5.

1 with the local usage options referenced in the June 2, 2000 Order,
2 in order to verify the type of traffic being transmitted over
3 combinations of loop and transport network elements. If, based on
4 its audits, BellSouth concludes that NewSouth is not providing a
5 significant amount of local exchange traffic over the combinations
6 of loop and transport network elements, BellSouth may file a
7 complaint with the appropriate Commission, pursuant to the
8 dispute resolution process as set forth in this Agreement. In the
9 event that BellSouth prevails, BellSouth may convert such
10 combinations of loop and transport network elements to special
11 access services and may seek appropriate retroactive
12 reimbursement from NewSouth.²⁷

13
14 Q. IS THIS THE ONLY LANGUAGE IN THE AGREEMENT THAT
15 ADDRESSES EEL AUDITS?

16
17 A. No. As I mentioned above, the parties negotiated Option 4 as an additional “safe
18 harbor” that is not addressed in the *Supplemental Order Clarification*, and the
19 Agreement contains language that applies specifically and exclusively to audits
20 regarding self-certifications under Option 4.

21
22 Q. WHAT DOES THIS AUDIT LANGUAGE THAT IS UNIQUE TO OPTION 4
23 SELF-CERTIFICATIONS SAY?

²⁷ Agreement, Att. 2, § 10.5.4.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

A. The language, which appears in Attachment 2, Section 4.5.2.2 of the Agreement, says:

Upon request from NewSouth to convert special access circuits pursuant to Section 4.5.2, BellSouth shall have the right, upon 10 business days notice, to conduct an audit prior to any such conversion to determine whether the subject facilities meet local usage requirements set forth in Section 4.5.2. *An audit conducted pursuant to this section* shall take into account a usage period of the past three (3) consecutive months, *and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order*, except as expressly modified herein. (Emphasis added).

Q. DOES ANY OTHER LANGUAGE IN THE AGREEMENT SAY THAT AN EEL AUDIT IS SUBJECT TO THE REQUIREMENTS FOR AUDITS AS SET FORTH IN THE FCC'S JUNE 2, 2000 *SUPPLEMENTAL ORDER CLARIFICATION*?

A. No. This language is unique to the section of the Agreement that addresses a front-end audit of a self-certification under Option 4 – this language does not appear in any other section that addressed EELs.

D. NewSouth's EELs.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Q. HAS NEWSOUTH CONVERTED ANY SPECIAL ACCESS CIRCUITS TO EELS IN SOUTH CAROLINA?

A. Yes. Pursuant to the Agreement's conversion provisions, as of December 2005, NewSouth converted approximately 800 special access circuits to EELs in South Carolina since 2001. Some of these circuits have since been disconnect.

Q. HAS NEWSOUTH ORDERED ANY NEW EELS IN SOUTH CAROLINA?

A. Yes, as of December 2005, NewSouth has ordered approximately 680 new EEL circuits in South Carolina, starting in May, 2001. Some of these circuits have since been disconnect.

Q. COULD YOU BRIEFLY EXPLAIN HOW NEWSOUTH WENT ABOUT ORDERING THESE EELS?

A. Yes. In late summer 2001, pursuant to the conversion process set forth in the Agreement, NewSouth began to submit requests to BellSouth via e-mail to convert special access circuits to UNEs. According to the procedures agreed to by the Parties, these e-mails were to attach one or more spreadsheets, using a particular format. The spreadsheets were to identify the circuits to be converted

1 and which of the four safe harbor options applied to that circuit. Since 2001,
2 NewSouth has requested conversion of thousands of circuits from special access
3 services to UNEs on a region-wide basis. In addition, NewSouth has ordered
4 approximately 1,700 new EELs from BellSouth on a region-wide basis.

5
6 Pursuant to the terms of the Agreement, BellSouth processed both orders for new
7 EELs and the conversions from special access circuits to UNEs based on
8 NewSouth's self-certifications. At no time did BellSouth demand or request any
9 audit of any NewSouth circuits prior to the conversion of those circuits from
10 special access to EELs.

11
12 Q. DID NEWSOUTH PROVIDE ANY CERTIFICATIONS TO BELL SOUTH
13 REGARDING THOSE CONVERSIONS?

14
15 A. Yes. NewSouth self-certified that the majority of its EEL facilities were being
16 used to provide a "significant amount of local exchange service" under Option 2.
17 As the FCC explained in Paragraph 22 of its *Supplemental Order Clarification*
18 (which is expressly incorporated into Attachment 2, Section 4.5.1.2 of the
19 Agreement), under this option:

20 The requesting carrier certifies that it provides local exchange and
21 exchange access service to the end user customer's premises and
22 handles at least one third of the end user customer's local traffic
23 measured as a percent of total end user customer local dialtone

1 lines; and for DS1 circuits and above, at least 50 percent of the
2 activated channels on the loop portion of the loop-transport
3 combination have at least 5 percent local voice traffic individually,
4 and the entire loop facility has at least 10 percent local voice
5 traffic. When a loop-transport combination includes multiplexing
6 (e.g., DS1 multiplexed to DS3 level), each of the individual DS1
7 circuits must meet this criteria. The loop-transport combination
8 must terminate at the requesting carrier's collocation arrangement
9 in at least one incumbent LEC central office. This option does not
10 allow loop-transport combinations to be connected to the
11 incumbent LEC's tariffed services. Under this option, a carrier's
12 provision of at least one third of an end user's local traffic is
13 significant because it indicates that the carrier is providing more
14 than a de minimis amount, but less than all, of the end user's local
15 service. As we stated above, we find this to be a reasonable
16 indication that the requesting carrier has taken affirmative steps to
17 provide local exchange service to the end user, and is not using the
18 facilities solely to bypass special access service. Such a carrier
19 may then use unbundled loop-transport combinations to serve the
20 customer as long as the active channels on the facility, and the
21 entire facility, are being used to provide the amount of local
22 exchange service specified in this option, thereby offering the

1 carrier some flexibility to use the combinations to provide other
2 services besides local exchange service.

3
4 Q. DID BELL SOUTH REQUEST AN AUDIT OF ANY OF THESE CIRCUITS
5 PRIOR TO PROVISIONING THE CONVERSION AS REQUESTED BY
6 NEWSOUTH?

7
8 A. No. At no time did BellSouth demand or request an audit of any NewSouth
9 circuits prior to provisioning the conversions.

10
11 **E. BellSouth's Audit Requests and NewSouth's Refusal.**

12
13 Q. AFTER PROVISIONING THE CONVERSIONS AS REQUESTED BY
14 NEWSOUTH, DID BELL SOUTH LATER SEEK TO AUDIT NEWSOUTH'S
15 EELS?

16
17 A. Yes. On April 26, 2002, in accordance with the terms of the Agreement,
18 BellSouth sent NewSouth a letter providing 30 days' notice of BellSouth's intent
19 to audit NewSouth's EELs.²⁸ BellSouth advised in the letter that the purpose of
20 the audit was to "verify NewSouth's local usage certification and compliance with
21 the significant local usage requirements of the FCC *Supplemental Order*."
22 BellSouth informed NewSouth that it had selected an independent auditor to

²⁸ Exhibit PCF-5 to my Direct Testimony is a copy of this letter.

1 conduct the audit, and that BellSouth would incur the costs of the audit.

2 BellSouth forwarded a copy of the audit request letter to the FCC.

3
4 Q. AT ANY TIME PRIOR TO APRIL 26, 2002, HAD BELLSOUTH AUDITED
5 NEWSOUTH'S EELS?

6
7 A. No.

8
9 Q. HOW DID NEWSOUTH RESPOND TO BELLSOUTH'S REQUEST TO
10 AUDIT NEWSOUTH'S EELS?

11
12 A. NewSouth refused to permit the audit. NewSouth has blocked the audit because
13 BellSouth has not *first*: (1) "demonstrated a concern" regarding circuit non-
14 compliance with the self-certification NewSouth provided in order to qualify for
15 the conversions under the Agreement; (2) linked its "concern" or "concerns" to
16 each and every converted circuit to be audited; (3) confirmed that it seeks to audit
17 only those circuits for which such linkage is demonstrated; (4) confirmed to its
18 satisfaction that BellSouth's request to audit are not routine in nature; and (5)
19 hired a suitably "independent auditor" to conduct the audit "in accordance with
20 AICPA²⁹ standards." Composite Exhibit PCF-6 to my Direct Testimony consists
21 of copies of various correspondence between BellSouth and NewSouth regarding
22 this issue.

23

29 "AICPA" stands for American Institute for Certified Public Accountants.

1 Q. IS BELLSOUTH WILLING TO UNDERTAKE THE AUDIT AT ITS SOLE
2 EXPENSE?

3

4 A. Yes.

5

6 Q. HAVE THE PARTIES DISCUSSED THE AUDIT REQUEST?

7

8 A. Yes. Since the April 26, 2002 audit notice, the parties have exchanged
9 correspondence and verbal communications -- BellSouth seeking to audit the
10 EELs, and NewSouth refusing to permit the audit as sought. BellSouth has
11 disagreed entirely with NewSouth's positions, and has repeatedly stated that the
12 Agreement does not permit NewSouth to block or delay the audit on any of
13 NewSouth's stated grounds.

14

15 Q. ARE YOU AWARE OF ANYTHING THAT TOOK PLACE DURING THE
16 PARTIES' NEGOTIATION OF THE AGREEMENT THAT SUPPORTS
17 BELLSOUTH'S POSITION THAT IT IS ENTITLED TO IMMEDIATELY
18 AUDIT NEWSOUTH'S EELS OR THAT REFUTES NEWSOUTH'S
19 POSITION THAT BELLSOUTH IS NOT ENTITLED TO IMMEDIATELY
20 AUDIT NEWSOUTH'S EELS?

21

22 A. Yes, I am aware of several facts regarding the negotiation of the Agreement that
23 support BellSouth's position and that refute NewSouth's position.

1

2 Q. HAVE YOU ADDRESSED THOSE FACTS IN YOUR DIRECT TESTIMONY?

3

4 A. No.

5

6 Q. WHY NOT?

7

8 A. As explained in detail in its Complaint, BellSouth's position is that the terms of
9 the Agreement unambiguously entitle BellSouth to the relief it seeks and that it is
10 inappropriate to go beyond the plain words of the Agreement in this proceeding.
11 Therefore, I am not addressing matters that arose during negotiations in my direct
12 testimony. I reserve the right to do so, if necessary and appropriate, in my
13 rebuttal testimony.

14

15 **III. BELL SOUTH'S CONCERNS REGARDING NEWSOUTH'S**

16 **CERTIFICATIONS**

17

18 Q. DOES BELL SOUTH AGREE WITH NEWSOUTH' ASSERTION THAT IN
19 ORDER TO CONDUCT AN AUDIT OF BELL SOUTH'S EELS, BELL SOUTH
20 MUST DEMONSTRATE A "CONCERN" REGARDING NEWSOUTH'S EEL
21 CERTIFICATIONS?

22

23 A. No. The reasons for BellSouth's position on this issue are explained in its

1 Complaint.

2
3 Q. WITHOUT WAIVING THAT POSITION, DID BELL SOUTH HAVE A
4 "CONCERN" WITH REGARD TO NEWSOUTH'S EEL CERTIFICATIONS
5 WHEN IT SOUGHT TO AUDIT NEWSOUTH'S EELS?
6

7 A. Yes. BellSouth has reason to question the accuracy of NewSouth's statements
8 regarding the jurisdiction of the traffic it was sending to BellSouth at the time it
9 began converting EELs and ordering new EELs under the Agreement. In
10 December 2001, for example, NewSouth provided BellSouth a jurisdictional
11 factor indicating that one hundred percent of the traffic it was sending BellSouth
12 was local exchange traffic. BellSouth's quarterly traffic studies, however,
13 indicated that at that time, only approximately 70% of the traffic NewSouth was
14 sending BellSouth was local exchange traffic.
15

16 Additionally, in July 2002 NewSouth provided BellSouth a jurisdictional factor
17 indicating that ninety-eight percent of the traffic it was sending BellSouth was
18 local exchange traffic. BellSouth's traffic studies, however, indicated that at that
19 time, only approximately 75% of the traffic NewSouth was sending BellSouth
20 was local exchange traffic.
21

22 Further, in July 2002, NewSouth was reported a Percent Interstate Usage –
23 Entrance Facility of 52%. This factor indicates the percentage of interstate (i.e.,

1 non-local) traffic that is being transported over dedicated facilities a carrier has
2 purchased from BellSouth. This means that only 48% of this traffic was
3 intrastate, and in all likelihood, only a portion of that intrastate traffic was local
4 (because some of it likely was intrastate but non-local).

5
6 Finally, as BellSouth has informed NewSouth, traffic studies show that
7 NewSouth's overall mix of traffic in South Carolina is 75% local.

8
9 Q. IF THESE STUDIES INDICATE 75% LOCAL TRAFFIC FOR NEWSOUTH IN
10 SOUTH CAROLINA, WHY IS BELL SOUTH CONCERNED THAT
11 NEWSOUTH IS NOT MEETING THE "SIGNIFICANT AMOUNT OF LOCAL
12 EXCHANGE SERVICE" REQUIREMENT.

13
14 A. Although the traffic studies indicate that 75% of NewSouth's traffic at a statewide
15 level in South Carolina is local, the studies are only conducted quarterly and are
16 simply a one-month snapshot of the traffic NewSouth and other carriers are
17 terminating to BellSouth. Additionally, the studies are not specific to EEL
18 circuits, which means that the percentage of local traffic associated with EELs
19 could be either higher or lower than the statewide average shown in the study.
20 These studies, however, suggest that when compared to other local exchange
21 carriers in South Carolina, either NewSouth's customers have a relatively high
22 propensity to make non-local calls or at least some of its customers are making a
23 very high percentage of non-local calls. The possibility that such traffic is going

1 over EELs gives rise to a concern as to whether NewSouth is in compliance with
2 its self-certifications.

3
4 Therefore the only appropriate method to determine if NewSouth is meeting the
5 “Significant Amount of Local Exchange Service” requirement with regard to its
6 EELs is to conduct an audit. The traffic study is simply an indicator that a
7 problem exists in the way NewSouth reported its jurisdictional factors.

8
9 Q. IF BELL SOUTH IS REQUIRED TO DEMONSTRATE A “CONCERN”
10 PRIOR TO CONDUCTING AN AUDIT (AND BELL SOUTH DOES NOT
11 BELIEVE THAT IT IS), DOES THE INFORMATION YOU JUST PROVIDED
12 DEMONSTRATE SUCH A “CONCERN?”

13
14 A. Yes. As I explained above, BellSouth has reason to question the accuracy of
15 NewSouth’s statements regarding the jurisdiction of the traffic it sends to
16 BellSouth. Additionally, BellSouth’s traffic studies indicate that NewSouth’s
17 overall mix of traffic in several states is largely non-local. In Louisiana, only
18 66% of NewSouth’s overall traffic is local; in North Carolina, just 45% is local;
19 and in Tennessee, only 38% of all NewSouth’s traffic is local.

20
21 Additionally, BellSouth has never audited any of the thousands of EEL circuits it
22 has been providing NewSouth, and BellSouth is willing to undertake the audit at
23 its sole expense. Moreover, if NewSouth has concerns regarding the results of the

1 audit, it can bring those concerns to the Commission because, as I explained
2 earlier, the Agreement does not provide any “self-help” mechanism to BellSouth
3 – instead, if BellSouth concludes that NewSouth is not providing a significant
4 amount of local exchange traffic over its EELs, BellSouth “may file a complaint
5 with the appropriate Commission, pursuant to the dispute resolution process as set
6 forth in this Agreement.”

7
8 It is entirely reasonable, therefore, for BellSouth to request an audit of
9 NewSouth’s EELs.

10
11 Q. ARE THE TRAFFIC STUDIES YOU HAVE MENTIONED IN YOUR
12 TESTIMONY ATTACHED AS EXHIBITS?

13
14 A. No.

15
16 Q. WHY NOT?

17
18 A. These studies contain highly sensitive and proprietary information about not only
19 NewSouth, but other carriers as well. I understand that BellSouth’s attorneys are
20 working with the attorneys for the other parties to this docket to draft a proposed
21 protective order for the Commission’s consideration in this docket.

22
23 Q. DOES THE AGREEMENT STATE WHAT WILL HAPPEN IF, BASED ON

1 AN AUDIT, BELL SOUTH CONCLUDES THAT NEWSOUTH IS NOT
2 PROVIDING A SIGNIFICANT AMOUNT OF LOCAL EXCHANGE TRAFFIC
3 OVER ITS EELS IN SOUTH CAROLINA?
4

5 A. Yes, it does, and it is important to note that the Agreement does not provide any
6 “self-help” mechanism to BellSouth.
7

8 Instead, the Agreement provides: “If, based on its audits, BellSouth concludes that
9 [NewSouth] is not providing a significant amount of local exchange traffic over
10 the combinations of loop and transport network elements, BellSouth may file a
11 complaint with the appropriate Commission, pursuant to the dispute resolution
12 process as set forth in this Agreement.”³⁰
13

14 Q. IS BELL SOUTH'S RIGHT TO AUDIT LIMITED ONLY TO THE CIRCUITS
15 FOR WHICH CONCERN HAS BEEN DEMONSTRATED?
16

17 A. No.
18

19 Q. WHICH PARTY BEARS THE EXPENSE OF ANY EEL AUDIT THAT IS
20 CONDUCTED PURSUANT TO THE AGREEMENT?
21

22 A. As noted above, BellSouth bears the expense of conducting an EEL audit under
23 the Agreement.

³⁰ Agreement, Attachment 2, §4.5.1.5.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IV. NEWSOUTH’S CONCERN THAT BELLSOUTH ROUTINELY REQUESTS EEL AUDITS

Q. DOES BELLSOUTH CONDUCT ROUTINE AUDITS OF ALL CLECS, INCLUDING NEWSOUTH, WHO HAVE ORDERED EELS FROM BELLSOUTH?

A. No, BellSouth has not requested audits of all CLECs that have ordered EELs from BellSouth. BellSouth only requests audits when it believes that an audit is warranted due to a concern that the local usage options may not be met. BellSouth has only requested audits of 13 CLECs, which is only about one-fifth of the number of CLECs that purchase EELs from BellSouth.

V. NEWSOUTH’S CONCERNS REGARDING THE AUDITOR

Q. DOES THE AGREEMENT REQUIRE BELLSOUTH TO HIRE AN INDEPENDENT AUDITOR TO CONDUCT THE AUDIT?

A. No. Nothing in the Agreement requires that BellSouth hire an "independent auditor" to conduct EELs audits.

Q. DOES BELLSOUTH INTEND TO USE AN INDEPENDENT AUDITOR?

1 A. Yes. While BellSouth is not obligated to use an independent auditor, it intends to
2 do so.

3

4 Q. WHAT COMPANY DOES BELLSOUTH INTEND TO USE TO AUDIT
5 NEWSOUTH'S EELS IN SOUTH CAROLINA?

6

7 A. American Consultants Alliance.

8

9 Q. IS ACA AN INDEPENDENT AUDITOR?

10

11 A. Yes. ACA is not related to or affiliated with BellSouth in any way, it is not
12 subject to the control or influence of BellSouth, and it is not dependent on
13 BellSouth.

14

15 Q. HAS ACA PERFORMED WORK FOR BELLSOUTH IN THE PAST?

16

17 A. Yes. BellSouth has employed ACA to conduct five EEL audits, including an
18 audit of Newsouth's EELs in North Carolina. ACA also has performed other
19 work for BellSouth on issues unrelated to EELs.

20

21 Q. ARE THERE ANY INCENTIVES FOR ACA TO BE BIASED IN THEIR
22 CONDUCT OF THE REQUESTED AUDIT?

23

1 A. No. ACA is in the business of consulting and auditing, and it has many other
2 clients in addition to BellSouth. It is in the firm's best interest to maintain a
3 reputation of impartiality. Furthermore, under BellSouth's arrangement with
4 ACA, ACA is to be paid on an hourly basis without regard to the audit results.

5

6 Q. DOES BELLSOUTH WANT TO USE AN IMPARTIAL AUDITOR?

7

8 A. Yes. It would not make sense for BellSouth to choose an auditor lacking in
9 independence, experience, or professionalism. An improper audit would be
10 revealed immediately and would only harm BellSouth's interests.

11

12 As noted above, the Agreement states that if BellSouth finds non-compliance
13 through an audit, its remedy is to file "a complaint with the appropriate
14 Commission pursuant to the dispute resolution process as set forth in this
15 Agreement." If BellSouth had to file such a complaint, the audit results would
16 most likely be contested by NewSouth and would be scrutinized by this
17 Commission. Any audit lacking credibility would be readily exposed, and
18 BellSouth would gain nothing.

19

V. CONCLUSION

20

21 Q. HOW SHOULD THE COMMISSION RESOLVE THIS MATTER?

22

23 A. The Commission should grant BellSouth the relief requested in its Complaint and

1 as summarized above in Part I of my direct testimony.

2

3 Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

4

5 A. Yes, it does.

6

7 620060

8

9

Federal Communications Commission

FCC 99-370

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Implementation of the) CC Docket No. 96-98
Local Competition Provisions)
of the Telecommunications Act of 1996)

SUPPLEMENTAL ORDER

Adopted: November 24, 1999

Released: November 24, 1999

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. On September 15, 1999, we adopted the Third Report and Order and Fourth Further Notice of Proposed Rulemaking in this docket responding to the Supreme Court's January 1999 decision that directed us to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996. (1996 Act).¹ We hereby modify that Order with regard to the use of unbundled network elements to provide exchange access services.²

2. We conclude that, until resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, interexchange carriers (IXCs) may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

II. DISCUSSION

3. In the *Third Report and Order and Fourth FNPRM*, we concluded that we would address in the Fourth FNPRM whether there were any legal or policy ramifications of applying

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*Third Report and Order and Fourth FNPRM*) (citing *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999)).

² *Id.* at paras. 483-89.

our unbundling rules in a way that could “cause a significant reduction of the incumbent LECs’ special access revenues prior to full implementation of access charge and universal service reform.”³ We also concluded, in paragraph 486, that any requesting carrier is entitled to obtain existing combinations of loops and transport between the end user and the incumbent LEC’s serving wire center on an unrestricted basis at unbundled network element prices, and that a carrier that is collocated in a serving wire center is free to order combinations of loops and dedicated transport to that serving wire center as unbundled network elements as a substitute for the incumbent LECs’ regulated special access services.⁴

4. Since the release of the *Third Report and Order* and *Fourth FNPRM*, several incumbent LECs have claimed that we did not sufficiently preserve the special access issue in the Fourth FNPRM. Specifically, they contend that paragraph 486 allows collocated IXC that self-provision entrance facilities (or obtain them from third parties) to convert the remaining portions of their special access circuits to unbundled network elements, even though the IXCs are not using the facilities to provide local exchange service. They contend that this would have significant effects in the competitive local exchange market as had been asserted previously to the Commission by BellSouth.⁵ We intended to compile a complete record in the Fourth FNPRM prior to determining whether IXCs may employ unbundled network elements solely to provide exchange access service.⁶ Accordingly, in order to preserve this issue in the Fourth FNPRM as we intended, we modify our conclusion in paragraph 486 to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements in this Order.⁷ We also modify our conclusion in paragraph 489 to the extent that it limited our concerns to entrance facilities.⁸ We now conclude that, until

³ *Id.* at para. 489.

⁴ *Id.* at para. 486.

⁵ See Letter from Michael Kellogg, on behalf of SBC, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Nov. 18, 1999); Letter from Dee May, Director, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Nov. 17, 1999); Letter from William B. Barfield, Associated General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98 (filed Aug. 9, 1999) (*BellSouth Aug. 9, 1999 Ex Parte*). BellSouth’s *Aug. 9, 1999 Ex Parte* indicated that the use of combinations of unbundled loops and transport solely for exchange access service would either increase the incumbent’s local rates or undermine universal service, or both. *BellSouth Aug. 9, 1999 Ex Parte* at 1. We underestimated the extent of the policy implications associated with temporarily constraining IXCs only from substituting entrance facilities for the incumbent LEC’s special access service, and we therefore now, as explained herein, include combinations of unbundled loops and transport network elements within the scope of this temporary constraint.

⁶ See *Third Report and Order* and *Fourth FNPRM* at para. 496.

⁷ *Id.* at para. 486 (stating that it would be impermissible for incumbent LECs to require that a requesting carrier provide a certain amount of local service over combinations of unbundled loop and transport facilities).

⁸ *Id.* at para. 489 (stating that we will consider in the Fourth FNPRM the “discrete situation involving the use of dedicated transport links between the incumbent LEC’s serving wire center and an interexchange carrier’s switch or point of presence (or ‘entrance facilities’).”

resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This will give us sufficient time to issue an order addressing the Fourth FNPRM.

5. This constraint does not apply if an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.⁹ It therefore does not affect the ability of competitive LECs to use combinations of loops and transport (referred to as the enhanced extended link) to provide local exchange service. It also does not affect the ability of competitive LECs that are collocated and have self-provided transport (or obtained it from third parties), but are purchasing unbundled loops, to provide exchange access service. As we stated in paragraph 487 of the *Third Report and Order and Fourth FNPRM*, such a competitive carrier is entitled to purchase unbundled loops in order to provide advanced services (e.g., interstate special access xDSL service).¹⁰ Finally, the constraint will have no effect on competitive LECs using long distance switches to provide local exchange service.

6. We also expand the scope of the Fourth FNPRM to seek comment on whether there is any basis in the statute or our rules under which incumbent LECs could decline to provide combinations of loops and transport network elements at unbundled network element prices. We also seek comment on the argument that the “just and reasonable” terms of section 251(c) or section 251(g) permit the Commission to establish a usage restriction on combinations of unbundled loops and transport network elements. Parties should also address whether there is any other statutory basis for limiting an incumbent LEC’s obligation to provide combinations of loops and transport facilities as unbundled network elements. As we stated in the *Third Report and Order and Fourth FNPRM*, in light of the fact that it is not clear that the 1996 Act permits any restrictions to be placed on the use of unbundled network elements,¹¹ we particularly urge parties

⁹ For example, we would consider the local service component as described in a joint *Ex Parte* submitted by Intermedia to be significant. See Letter from Edward D. Young, III, Senior Vice President and Deputy General Counsel, Bell Atlantic; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Robert W. McCausland, Vice President-Regulatory and Interconnection, Allegiance Telecom; Don Shephard, Vice President, Federal Regulatory Affairs, Time Warner Telecom, to Chairman Kennard and Commissioners, Federal Communications Commission, CC Docket No. 96-98, at 1-2 (filed Sept. 2, 1999). In addition, we will presume that the requesting carrier is providing significant local exchange service if the requesting carrier is providing all of the end user’s local exchange service. Because we intend the constraint we identify in this Order to be limited in duration, we do not find it to be necessary for incumbent LECs and requesting carriers to undertake auditing processes to monitor whether or not requesting carriers are using unbundled network elements solely to provide exchange access service. We expect that allowing requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements will not delay their ability to convert these facilities to unbundled network element pricing, and we will take swift enforcement action if we become aware that any incumbent LEC is unreasonably delaying the ability of a requesting carrier to make such conversions.

¹⁰ *Third Report and Order and Fourth FNPRM* at para. 487.

¹¹ *Id.* at para. 484.

to consider and address what long term solutions may be necessary to avoid adverse effects on any special access revenues that support universal service.

7. This temporary constraint on the use of combinations of unbundled loops and transport network elements to provide exchange access service is consistent with the Commission's finding in the *Local Competition First Report and Order*, that we may, where necessary, establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of 1996 Act, including the full implementation of a competitively-neutral system to fund universal service and a completed transition to cost-based access charges.¹² We believe that this short-term constraint will avoid disturbing the status quo while we consider the legal and economic implication of allowing carriers to substitute combinations of unbundled loops and transport network elements for the incumbent LECs' special access services. As we did in the *Local Competition First Report and Order*, we emphasize that this constraint will apply only as an interim measure.¹³

III. FINAL REGULATORY FLEXIBILITY ANALYSIS

8. In the *Third Report and Order and Fourth FNPRM*, we conducted a Final Regulatory Flexibility Analysis, as required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603. The changes we adopt in this Order do not affect that analysis.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), the Commission amends paragraph 486, 489, and 494-96 in the *Third Report and Order and Fourth FNPRM* to be consistent with the discussion set out above. Thus, the constraint on the use of unbundled network elements as a substitute for special access service and the scope of the corresponding inquiry in the Fourth FNPRM are not limited to entrance facilities, but instead include combinations of unbundled loops and transport network elements. This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

FEDERAL COMMUNICATIONS COMMISSION

¹² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd at 15499, 15862-69, paras. 716-32 (1996) (*Local Competition First Report and Order*).

¹³ *Id.* at 15866, para. 725.

Federal Communications Commission

FCC 99-370

Magalie Roman Salas
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of the)
Local Competition Provisions) CC Docket No. 96-98
Of the Telecommunications Act of 1996)
)
)
)
)
)

SUPPLEMENTAL ORDER CLARIFICATION

Adopted: May 19, 2000

Released: June 2, 2000

By the Commission: Chairman Kennard and Commissioner Ness issuing separate statements;
Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. On November 5, 1999, we released the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* in this docket responding to the U.S. Supreme Court's January 1999 decision that directed us to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996 (1996 Act).¹ On November 24, 1999, we released a *Supplemental Order* that modified the *Third Report and Order and Fourth FNPRM* with regard to the ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*.² In this Order, we take three actions to extend and clarify the temporary constraint that we adopted in the *Supplemental Order*. First, we extend the temporary constraint identified in the *Supplemental Order* while we compile an adequate record for addressing the legal and policy disputes presented here. Second, we clarify what constitutes a "significant amount of local exchange service." Third, we clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3699, para. 1 (1999) (citing *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)) (*Third Report and Order and Fourth FNPRM*).

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) (*Supplemental Order*).

significant local usage requirements.

II. BACKGROUND

2. In the *Third Report and Order*, we explained that incumbent LECs routinely provide the functional equivalent of combinations of unbundled loop and transport network elements (also referred to as the enhanced extended link) through their special access offerings. Because section 51.315(b) of the Commission's rules precludes the incumbent LECs from separating loop and transport elements that are currently combined, we stated that a requesting carrier could obtain these combinations at unbundled network element prices.³ At the same time, we stated our concern that allowing requesting carriers to use loop-transport combinations solely to provide exchange access service to a customer, without providing local exchange service, could have significant policy ramifications because unbundled network elements are often priced lower than tariffed special access services. Because of concerns that universal service could be harmed if we were to allow interexchange carriers (IXCs) to use the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges,⁴ we agreed that we should further explore these considerations, recognizing that full implementation of access charge and universal service reform was still pending.⁵

3. The question of whether we should allow requesting carriers to use unbundled network elements to provide exchange access service to customers to whom the requesting carrier does not provide local exchange service has arisen in three contexts. First, in the *Local Competition Third Order on Reconsideration*, the Commission limited the obligation of incumbent LECs to provision shared transport as an unbundled network element to requesting carriers that provide local exchange service to a particular end user. It also sought comment on whether requesting carriers may use unbundled dedicated or shared transport facilities, in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.⁶ Second, in the *Fourth FNPRM*, we asked parties to address the legal and policy issues associated with the ability of requesting carriers to obtain entrance facilities, which consist of a dedicated link from a carrier's point-of-presence to an incumbent LECs' serving wire center, as an unbundled network element.⁷ We also asked that parties refresh the record in the *Local Competition Third Order on*

³ *Third Report and Order*, 15 FCC Rcd at 3909, paras. 480-81 (citing 47 C.F.R. 51.315(b)).

⁴ *Id.* at 3912, para. 485 (citing Letter from William B. Barfield, Associate General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98, at 1 (filed Aug. 9, 1999) (*BellSouth Aug. 9, 1999 Letter*)).

⁵ *Third Report and Order*, 15 FCC Rcd at 3912-13, paras. 485-89.

⁶ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12494-96, paras. 60-61 (1997) (*Local Competition Third Order on Reconsideration*).

⁷ *Fourth FNPRM*, 15 FCC Rcd at 3914-15, paras. 494-96.

*Reconsideration.*⁸ Third, in the *Supplemental Order*, we expanded the scope of the *Fourth FNPRM* to seek comment on whether incumbent LECs could decline to provide carriers combinations of unbundled loop and transport network elements solely for the provision of exchange access service.⁹

4. A series of events since the Commission issued its *Local Competition First Report and Order*, culminating in the Supreme Court's decision in *AT&T v. Iowa Utilities Bd.*,¹⁰ have shaped the issues associated with the ability of carriers to substitute unbundled network elements for tariffed special access services. Although the Commission found in the *Local Competition First Report and Order* that the Act does not permit incumbent LECs to place restrictions on the use of unbundled network elements,¹¹ it concluded that it was necessary to adopt a temporary mechanism to avoid a reduction in contributions to universal service prior to full implementation of access charge and universal service reform.¹² It therefore allowed incumbent LECs to recover access fees from purchasers of unbundled network elements until June 30, 1997.¹³ Before this transition period expired, the Eighth Circuit stayed the Commission's unbundled network element pricing rules in October, 1996.¹⁴ Once these rules were stayed, it became uncertain whether or

⁸ *Id.* at 3915, para. 496.

⁹ By limiting the ability of carriers to convert the entrance facility portion of special access service to unbundled network element pricing in the *Third Report and Order*, we believed that could sufficiently preserve the status quo while we examined the legal and policy ramifications of allowing requesting carriers to substitute unbundled network elements for special access service. We concluded subsequently in the *Supplemental Order* that we had underestimated the extent of the policy implications associated with temporarily constraining IXCs only from substituting entrance facilities for the incumbent LEC's special access service, and extended the temporary constraint to include combinations of unbundled loops and dedicated interoffice transport network elements. *Supplemental Order* at para. 4, n.5.

¹⁰ *Iowa Utils. Bd. v. FCC*, 119 S. Ct. 721, 729-32, 736-38 (1999) (*Iowa Utils. Bd.*).

¹¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15680, para. 359 (1996) (*Local Competition First Report and Order*), aff'd in part and vacated in part sub nom., *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further recons. pending.

¹² *Local Competition First Report and Order*, 11 FCC Rcd at 15862-64, paras. 716-20.

¹³ *Id.* at 15864-66, para. 721-25. The Eighth Circuit Court of Appeals upheld the imposition of the temporary mechanism. *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997) (*CompTel v. FCC*).

¹⁴ *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 423-26 (8th Cir. 1997). The Commission's pricing rules are based on forward-looking costs. See *Local Competition First Report and Order*, 11 FCC Rcd at 15844-62, paras. 672-715. The Eighth Circuit made final its determination that the Commission lacked authority under the 1996 Act to determine the rates involved in the implementation of the local competition provisions of the Act, including rates for access to unbundled network elements. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 793-796 (8th Cir. 1997).

not unbundled network elements would continue to be priced at forward-looking cost and whether there would be a significant difference between tariffed access rates and unbundled network element rates. Then, in 1997, the Eighth Circuit also vacated sections 51.315(b)-(f) of the Commission's rules, which protected the right of requesting carriers to obtain combinations of unbundled network elements, such as loop-transport combinations.¹⁵ Vacatur of rule 51.315(b), in particular, precluded requesting carriers from obtaining access to such combinations without first incurring costly reconnection charges. In January 1999, the Supreme Court reinstated the Commission's pricing rules and rule 51.315(b).¹⁶ At the same time, however, it ordered the Commission to revisit its implementation of section 251(d)(2), which addresses the circumstances in which incumbent LECs must make unbundled network elements available to requesting carriers.¹⁷ We addressed this issue in the *Third Report and Order* and determined that incumbent LECs must unbundle loops and interoffice transport individually.¹⁸ The *Fourth FNPRM* asks about the legal and policy implications of allowing requesting carriers to substitute combinations of unbundled loop and transport network elements for the incumbent LECs' tariffed special access service.

5. We took several steps in the *Supplemental Order* to ensure that we sufficiently preserved the status quo pertaining to the special access issue while the *Fourth FNPRM* remains pending. Specifically, we concluded that until resolution of the *Fourth FNPRM*, which we said would occur on or before June 30, 2000, IXC's may not convert special access services to combinations of unbundled loop and transport network elements. We explained that this constraint does not apply if an IXC uses such combinations to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.¹⁹ In order to determine whether or not an IXC is using combinations of unbundled network elements to provide a significant amount of local exchange service, we stated that we would consider, for example, whether the IXC was providing at least one third of the customer's local traffic as described in a joint filing submitted by several parties.²⁰ In addition, we stated that we would presume that the requesting carrier is providing a significant amount of local exchange service if it

¹⁵ *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813 (citing 47 C.F.R. § 51.315(b)-(f)).

¹⁶ *Iowa Utils. Bd. v. FCC*, 119 S. Ct. at 736-38. The validity of rules 51.315(c)-(f), requiring incumbent LECs to combine network elements that are not currently combined, is again pending before the Eighth Circuit after the Commission asked the Court to reinstate the rules. See *Third Report and Order*, 15 FCC Rcd at 3907, para. 475.

¹⁷ *Iowa Utils. Bd. v. FCC*, 119 S. Ct. at 733-36 (citing section 47 U.S.C. § 251(d)(2)).

¹⁸ *Third Report and Order*, 15 FCC Rcd at 3779-3787, 3842-3866, paras. 181-201, 321-79.

¹⁹ *Supplemental Order* at paras. 4-5.

²⁰ *Id.* at n. 9 (citing Letter from Edward D. Young, III, Senior Vice President and Deputy General Counsel, Bell Atlantic; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Robert W. McCausland, Vice President-Regulatory and Interconnection, Allegiance Telecom; Don Shepherd, Vice President, Federal Regulatory Affairs, Time Warner Telecom, to Chairman Kennard and Commissioners, FCC, CC Docket No. 96-98, at 1-2 (filed Sept. 2, 1999)) (*Bell Atlantic September 1999 Joint Letter*).

is providing all of the end user's local exchange service.²¹

6. In a joint filing submitted on February 28, 2000, several incumbent LECs and competitive LECs request that the Commission clarify the *Supplemental Order* regarding the minimum amount of local service a requesting carrier must provide in order to convert special access services to combinations of unbundled loop and dedicated transport network elements.²² They propose certain changes to the *Bell Atlantic September 1999 Joint Letter* and request that the Commission modify the amount of local traffic considered "significant" in accordance with these changes.²³ The parties further request that the Commission allow limited auditing rights in order to ensure that requesting carriers meet the minimum threshold for purchasing combinations of unbundled loop and dedicated transport network elements.²⁴ Several parties responded to the *February 28, 2000 Joint Letter*. They argue generally that the use limitations on combinations that the incumbent LECs and competitive LECs propose are too restrictive, and will prevent requesting carriers from being able to use combinations of unbundled network elements to serve their customers.²⁵ We address these filings in this Order.

III. DISCUSSION

7. As we observed in the *Third Report and Order and Fourth FNPRM*, and as we

²¹ *Supplemental Order* at n.9.

²² Letter from Gordon R. Evans, Vice President Federal Regulatory, Bell Atlantic; Robert T. Blau, Vice President Executive and Federal Regulatory Affairs, BellSouth; Richard Metzger, Vice President Regulatory and Public Policy, Focal Communications; Alan F. Ciamporocero, Vice President-Regulatory Affairs, GTE Service Corporation; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Priscilla Hill-Ardoin, Senior Vice President-Federal Regulatory, SBC Communications, Inc.; Don Shephard, Vice President, Federal Regulatory Affairs, Time Warner Telecom; Melissa Newman, Vice President-Regulatory Affairs, U.S. West, Inc.; Russell C. Merbeth, Vice President, Legal and Regulatory Affairs, WinStar Communications, Inc. to Chairman Kennard and Commissioners, FCC, CC Docket No. 96-98 (filed February 28, 2000) (*February 28, 2000 Joint Letter*).

²³ *February 28, 2000 Joint Letter* at 1-2.

²⁴ *Id.* at 3.

²⁵ Letter from Joseph Kahl, Director Regulatory Affairs, RCN Telecommunications Services; and other members of the Competitive Telecommunications Association (CompTel) to The Honorable William E. Kennard, Chairman, FCC, CC Docket No. 96-98 (filed March 13, 2000) (*Comptel March 13, 2000 Letter*); Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Larry Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98 (filed March 10, 2000) (*MCI WorldCom March 10, 2000 Letter*); Letter from Jonathan Askin, General Counsel, Association for Local Telecommunications Services (ALTS), CC Docket No. 96-98 (filed March 24, 2000) (*ALTS March 24, 2000 Letter*); Letter from Jonathan E. Canis, Counsel for Winstar Communications and e.spire Communications, to Magalie R. Salas, Secretary, FCC, CC Docket No. 96-98 (filed Mar. 29, 2000); Letter from Douglas G. Bonner, Counsel for VoiceStream Wireless Corporation, Daniel Waggoner, Counsel for AT&T Wireless Corporation, Mary Davis, Esq., Manager-External Affairs, United States Cellular Corporation, to The Honorable William E. Kennard, Chairman, and Commissioners, FCC, CC Docket No. 96-98 (filed Apr. 12, 2000); Letter from Ross A. Buntrock, Counsel for e.spire Communications, to Magalie R. Salas, Secretary, FCC, CC Docket No. 96-98 (filed Apr. 19, 2000).

reaffirmed in the *Supplemental Order*, permitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations and would threaten an important source of funding for universal service.²⁶ For example, in the absence of completed implementation of access charge reform, allowing the use of combinations of unbundled network elements for special access could undercut universal service by inducing IXC's to abandon switched access for unbundled network element-based special access on an enormous scale.²⁷ In the words of one incumbent LEC, this would amount to a "roundabout termination" of the access charge regime, prior to the actual elimination of the implicit universal service subsidies contained in access charges, and would require it to bear the expense of providing local dialtone service without a viable means of recovering the costs of universal service.²⁸ We therefore invoked our longstanding authority to adopt temporary measures designed to protect universal service and prevent industry instability during periods of regulatory transition.²⁹

8. Although we have recently taken significant steps in implementing access charge reform,³⁰ a number of additional considerations, discussed below, require us to extend the temporary constraint identified in the *Supplemental Order* while we compile an adequate record in the *Fourth FNPRM* for addressing the legal and policy issues that have been raised. Therefore, until we resolve the issues in the *Fourth FNPRM*, IXC's may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.³¹ We emphasize that by issuing this clarification order, we do not decide any of the substantive issues in the *Fourth FNPRM* on the merits.

9. We previously asked commenters to discuss the source and extent of any right of incumbent LEC's to withhold unbundled network elements from carriers seeking to use such elements solely for the purpose of providing special access services.³² As discussed below,

²⁶ *Third Report and Order and Fourth FNPRM*, 15 FCC Rcd at 3912, 3913, paras. 485, 489; *Supplemental Order* at 7.

²⁷ See *BellSouth Aug. 9, 1999 Letter* at 3-7; Bell Atlantic Reply Comments at 5; GTE Reply Comments at 9. The comments and reply comments cited in this order refer to the filings parties submitted in response to the *Fourth FNPRM* on January 19, 2000 and February 18, 2000.

²⁸ *BellSouth Aug. 9, 1999 Letter* at 6.

²⁹ See *Fourth FNPRM*, 15 FCC Rcd at 3914, para. 492 (citing *CompTel v. FCC*, 117 F.3d at 1073-75); see also *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984); *Supplemental Order* at para. 4, n.5.

³⁰ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1; Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, FCC 00-193 (rel. May 31, 2000).

³¹ *Supplemental Order* at para. 4. This temporary constraint does not apply to stand-alone loops. See *Third Report and Order*, 15 FCC Rcd at 3777, para. 177.

³² *Fourth FNPRM*, 15 FCC Rcd at 3914-15, para. 494; *Supplemental Order* at para. 6.

several commenters argue that such a right follows from the “impair” standard of section 251(d)(2), which directs the Commission to order the unbundling of network elements only after “consider[ing], at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”³³ In 1999, the Supreme Court rejected our prior rules implementing that provision and directed us to give greater effect to the “impair” standard.³⁴

10. In response to our inquiry in the *Fourth FNPRM*, the incumbent LECs argue that, in reexamining our implementation of section 251(d)(2), we must conduct a more market-specific analysis in deciding when network elements must be unbundled.³⁵ They contend that, in some contexts, denial of particular elements in the incumbent’s network may impair the ability of other carriers to provide services in one market but not in another. In those circumstances, the incumbents argue, the availability of such elements should be restricted to the carriers that intend to use them -- substantially, though not necessarily exclusively -- in the markets in which the “impair” standard is met. Here, the incumbents contend, denial of access to the loop-transport combinations at issue would not “impair” a carrier’s ability to provide services in the special access market or, more generally, in the exchange access market, of which the special access market is a subset.³⁶ Thus, the incumbents conclude, competitors have no statutory right to obtain access to such combinations for purposes of competing only in that market, even though the Commission has found that denial of access to those combinations would impair a carrier’s ability to compete in the separate market for ubiquitous local exchange and xDSL services.³⁷

11. Other commenters, by contrast, contend that “[t]he Section 251(d)(2) determination must . . . be made available on a *network element-by-network element* basis.”³⁸ Those commenters argue that if certain elements satisfy the “impair” standard with respect to *one* market, a carrier may automatically obtain access to those elements solely for purposes of competing in *other* markets, without using the elements to compete in the market that was the basis of the “impair” analysis.³⁹

³³ 47 U.S.C. 251(d)(2)(B).

³⁴ *Iowa Utils. Bd. v. FCC*, 119 S.Ct. at 733-36.

³⁵ See, e.g., Bell Atlantic Comments at 13-16; BellSouth Comments at 22-29; SBC Comments at 6-10; US West Comments at 2-12.

³⁶ Special access service employs dedicated, high-capacity facilities that run directly between the end user, usually a large business customer, and the IXC’s point-of-presence. See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, et al.*, CC Docket Nos. 96-262, 94-1, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, para. 8 (rel. Aug. 27, 1999) (*1999 Access Charge Reform Order*); US West Comments at 8-9.

³⁷ See, e.g., SBC Comments at 7; Bell Atlantic Comments at 18-19.

³⁸ AT&T Reply Comments at 11 (emphasis in original).

³⁹ *Id.* at 9-12; see also MCI WorldCom Reply Comments at 3-6.

12. Before the Supreme Court issued its decision in *Iowa Utilities Board*, we sometimes approached an incumbent's obligation to unbundle network elements as though it were an all-or-nothing proposition, suggesting that, if a competitor were entitled to obtain access to an element for one purpose, it was generally also entitled to obtain access to that element for wholly different purposes as well.⁴⁰ At that time, however, we never specifically focused on the relationship between that issue (particularly as it relates to this special access dispute) and the "impair" standard of section 251(d)(2). Now that the Supreme Court has rejected our previous interpretation of that provision as insufficiently rigorous, it is appropriate for us to revisit the issue.

13. In the *Third Report and Order*, we conducted a general "impair" analysis of loops and dedicated transport and ordered those elements to be unbundled.⁴¹ That analysis did not fully focus, however, on application of the "impair" standard to the exchange access market, with the limited exception of entrance facilities.⁴² With regard to entrance facilities, we determined that there was insufficient record evidence for us to find that requesting carriers had effective alternatives in the market to allow them to provide service.⁴³ We sought additional evidence in the *Fourth FNPRM* on whether there was any basis in the statute or our rules, including the "impair" standard, under which the incumbent LECs could decline to provide entrance facilities at unbundled network element prices, and we later modified this inquiry in the *Supplemental Order* to include loop-transport combinations.⁴⁴

14. The exchange access market occupies a different legal category from the market for telephone exchange services; indeed, at the highest level of generality, Congress itself drew an explicit statutory distinction between those two markets.⁴⁵ Even though the exchange access market is legally distinct from the local exchange market, we must determine whether the markets are otherwise interrelated from an economic and technological perspective, such that a finding that a network element meets the "impair" standard for the local exchange market would itself entitle competitors to use that network element solely or primarily in the exchange access market. Unless we find that these markets are inextricably interrelated in these other respects, it is unlikely that Congress intended to compel us, once we determine that a network element meets the "impair" standard for the local exchange market, to grant competitors access — for that

⁴⁰ See generally *Third Report & Order*, 15 FCC Rcd at 3911-12, para. 484 (discussing prior Commission orders); but see *id.* at para. 81 (finding that section 251(d)(2)(B) permits consideration of "the particular types of customers that the carrier seeks to serve"); SBC Comments at 8-9 (characterizing the Commission's limitation on access to circuit switches in the *Third Report & Order* as a use restriction).

⁴¹ *Third Report and Order*, 15 FCC Rcd at 3779-82, 3846-3852, paras. 182-189, 332-348.

⁴² *Id.* at 3852, para. 348.

⁴³ *Id.*

⁴⁴ *Fourth FNPRM*, 15 FCC Rcd at 3914-15, para. 494; *Supplemental Order* at para. 6.

⁴⁵ See, e.g., 47 U.S.C. 153(16) (defining "exchange access"); 153(47) (defining "telephone exchange service").

reason alone, and without further inquiry — to that same network element solely or primarily for use in the exchange access market.

15. Contrary to the views of some commenters,⁴⁶ section 251(d)(2) does not compel us, once we determine that any network element meets the “impair” standard for one market, to grant competitors automatic access to that same network element solely or primarily for use in a different market. That provision asks whether denial of access to network elements “would impair the ability of the telecommunications carrier seeking access to provide *the services that it seeks to offer*.”⁴⁷ Although ambiguous, that language is reasonably construed to mean that we may consider the markets in which a competitor “seeks to offer” services and, at an appropriate level of generality, ground the unbundling obligation on the competitor’s entry into those markets in which denial of the requested elements would in fact impair the competitor’s ability to offer services. We adopted a similar approach in the *Third Report and Order*, observing that, because “Section 251(d)(2)(B) requires us to consider whether lack of access to the incumbent LEC’s network elements would impair the ability of the carrier to provide the *services* it seeks to offer,” it is “appropriate for us to consider the particular types of customers that the carrier seeks to serve.”⁴⁸ In any event, even if section 251(d)(2) were altogether silent on this issue, that provision directs us to consider the substantive criteria of subparagraphs (A) and (B) “at a minimum.” As we have previously determined, that language authorizes us, at our discretion, to consider other factors in addition to those explicitly designated criteria, such as the development of facilities-based competition.⁴⁹ Here, the statute plainly entitles us to ask, as part of our inquiry into whether network elements should be made available for the sole or primary purpose of providing exchange access services, whether denying competitors access to that combination would in fact impair their ability to provide those services.⁵⁰

16. Our identification of the network elements that “should be made available” for purposes of section 251(d)(2) is an ongoing exercise in legislative rulemaking authority. The

⁴⁶ See, e.g., AT&T Reply Comments at 9-12.

⁴⁷ 47 U.S.C. 251(d)(2)(B) (emphasis added). Along similar lines, Rule 309(a), which we promulgated in 1996, addresses limitations on the use of network elements “that would *impair* the ability of a requesting telecommunications carrier” to offer particular services. 47 C.F.R. 51.309(a) (emphasis added).

⁴⁸ *Third Report and Order*, 15 FCC Rcd at 3737-38, para. 81 (emphasis in original).

⁴⁹ See *id.* at 3745-50, paras. 101-16.

⁵⁰ AT&T alternatively argues that section 251(c)(3) overrides any suggestion in section 251(d)(2) that we may conduct a market-specific analysis in making our unbundling determinations. AT&T Reply Comments at 10-12. We disagree. Section 251(c)(3) does not speak directly to whether a market-specific analysis is appropriate in determining whether carriers may obtain access to particular elements, and it could therefore pose no conflict with an otherwise proper implementation of section 251(d)(2). Moreover, as the Supreme Court held in *Iowa Utilities Board*, section 251(c)(3) does not itself create “some underlying duty” to “provide all network elements for which it is technically feasible to provide access.” 119 S.Ct. at 736. Instead, it is section 251(d)(2) that directs the Commission to issue legislative rules imposing unbundling obligations on incumbent LECs, and that provision permits the Commission to consider criteria that include “the services that [the requesting carrier] seeks to offer.”

inquiry we conduct in discharging that authority is necessarily empirical and dynamic. As we emphasized in the *Third Report and Order*, we properly look to actual developments in the telecommunications marketplace before imposing additional unbundling obligations on incumbent LECs; we generally do not impose such obligations first and conduct our “impair” inquiry afterwards.⁵¹ Here, we must gather evidence on the development of the marketplace for exchange access in the wake of the new unbundling rules adopted in the *Third Report and Order* before we can determine the extent to which denial of access to network elements would impair a carrier’s ability to provide special access services. One of our tasks will be to resolve a key empirical dispute: whether the markets for local exchange service and special access are so closely interrelated from an economic and technological perspective that a showing of impairment with respect to the former market would by itself tend to suggest, as a practical matter, that the “impair” standard is satisfied with respect to the latter market.⁵²

17. Our new unbundling rules, issued in the wake of *Iowa Utilities Board*, should significantly increase competition in local markets by removing long-standing uncertainty about the scope of the incumbent LECs’ unbundling obligations and by stimulating new investment. We must take the market effects of those new rules into account as we conduct our “impair” analysis for special access service, and we must therefore allow a meaningful period of time to elapse from the date on which those new rules became effective.⁵³ We will issue a Public Notice in early 2001 to gather evidence on this issue so that we may then resolve it expeditiously. In addition, the Commission and the parties need more time to evaluate the issues raised in the record in the *Fourth FNPRM*. For example, the incumbent LECs have produced complex economic analyses of the effect on the marketplace of permitting requesting carriers to convert existing special access services to combinations of unbundled network elements.⁵⁴ At least one party has argued that, in order to respond, it needs more information concerning the assumptions and calculations underlying the analysis.⁵⁵

⁵¹ See *Third Report and Order*, 15 FCC Red at 3712, para. 21 (“In considering whether to unbundle a particular network element, we look first to what is occurring in the marketplace today.”).

⁵² See AT&T Reply Comments at 15-19 (arguing that the facilities that competitive LECs use to provide special access are no different from the facilities they use to provide other services, and that thus, there is no basis to treat competitive LECs’ use of these elements to provide special access service differently from the use of the same facilities to provide other telecommunications services); MCI WorldCom Reply Comments at 7-10 (arguing that if there are insufficient lines from some incumbent LEC serving wire centers to IXC points-of-presence (POPs) such that competitive LECs are impaired without access to these lines to provide the “services they seek to offer,” then it follows that there are insufficient lines from some serving wire centers to IXC POPs such that they are also impaired in their ability to provide access services). *Contra* SBC Comments at 10-12 (arguing that the traditional special access/private line market is distinct from transport generally because competitive carriers have deployed fiber to specifically provide these services).

⁵³ While most of the unbundling rules that we adopted in the *Third Report and Order* became effective on February 17, 2000, certain requirements in the rules did not become effective until May 17, 2000. 65 Fed. Reg. 2542 (Jan. 18, 2000).

⁵⁴ See USTA Comments, Special Access Fact Report, Jan. 19, 2000.

⁵⁵ See MCI WorldCom Comments at 26-29.

18. Our extension of this temporary constraint is necessary for an independent reason as well. An immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers.⁵⁶ Competitive access, which originated in the mid-1980s, is a mature source of competition in telecommunications markets.⁵⁷ We are reluctant to adopt a flashcut approach with potentially severe consequences for the competitive access market without first permitting the development of a fuller record.

19. Contrary to the concerns of some parties,⁵⁸ the temporary constraint at issue here should not allow incumbent LECs that provide in-region long distance service to engage in “price squeezes” or other anticompetitive practices, either by allowing their long-distance affiliates to obtain access service below tariffed access charges or by impairing competition in the long-distance market by raising access charges across the board and simultaneously lowering the retail rates of its affiliate’s long-distance services to below cost. Incumbent LECs seeking to provide interLATA services through an affiliate must adhere to certain structural separation and non-discrimination requirements. For example, Congress anticipated that some Bell Operating Companies (“BOCs”) would obtain authorization under 47 U.S.C. 271 to originate in-region long-distance services before the completion of access charge reform (which includes reform not just of charges for the special access services at issue here, but also of charges for ordinary switched access as well). Congress therefore enacted Section 272, which requires a BOC competing in the in-region long-distance market to create a separate long-distance affiliate and to recover access charges from that affiliate on the same basis on which it recovers such charges from unaffiliated carriers.⁵⁹

20. As we have consistently determined, those structural and non-discrimination requirements provide adequate safeguards against any effort by an incumbent to obtain an unfair competitive advantage in the long-distance market by discriminating against unaffiliated IXC or

⁵⁶ See Time Warner Telecom Comments at 19.

⁵⁷ The Commission has observed competition develop in the special access market and has taken steps to increase the incumbent LECs’ pricing flexibility and ability to respond to the advent of such competition. 1999 *Access Charge Reform Order* at para. 14 (citing *Special Access Expanded Interconnection Order*, CC Docket Nos. 91-141 and 92-333, Report and Order, 7 FCC Rcd 7369 (1992) (subsequent citations omitted). See also *Third Report and Order*, 15 FCC Rcd at 3852, para. 348 (discussing alternatives to unbundled transport for certain point-to-point routes).

⁵⁸ See MCI WorldCom Comments at 16; TRA Comments at 9.

⁵⁹ See 47 U.S.C. 272(e)(3). In the *Accounting Safeguards Order*, the Commission determined that, “where a BOC charges different rates to different unaffiliated carriers for access to its telephone exchange service, the BOC must impute to its integrated operations the highest rate paid for such access by unaffiliated carriers.” *Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd at 17539, 17577, para. 87 (1996). See also *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Report and Order, 11 FCC Rcd 21905, 22028-30, paras. 256-58 (1996) (implementing section 272(e)(3)).

by improperly allocating costs or assets between itself and its long-distance affiliate.⁶⁰ Indeed, those “separation requirements have been in place for over ten years, and independent (non-BOC) incumbent LECs have been providing in-region, interexchange services on a separated basis with no substantiated complaints of a price squeeze.”⁶¹ Moreover, because the interim constraint at issue is merely temporary, we will of course be free to take into account any claims of unfair competition when we adopt permanent rules addressing the unbundling issue presented here.

21. To reduce uncertainty for incumbent LECs and requesting carriers and to maintain the status quo while we review the issues contained in the *Fourth FNPRM*, we now define more precisely the “significant amount of local exchange service” that a requesting carrier must provide in order to obtain unbundled loop-transport combinations. We recognize that making a determination about what constitutes a significant amount of local usage on a facility is not an exact science. We believe, however, that the incumbent LECs and competitive LECs that submitted the *February 28, 2000 Joint Letter* have presented a reasonable compromise proposal under which it may be determined that a requesting carrier has taken affirmative steps to provide local exchange service to a particular end user and is not seeking to use unbundled loop-transport combinations solely to bypass tariffed special access service. The local usage options we adopt below thus provide a safe harbor that allows the Commission to preserve the status quo while it examines the issues in the *Fourth FNPRM* in more detail, while still allowing carriers to use combinations of unbundled loop and transport network elements to provide local exchange service.

22. We find that a requesting carrier is providing a “significant amount of local exchange service” to a particular customer if it meets one of three circumstances:

- (1) As we found in the *Supplemental Order*, the requesting carrier certifies that it is the exclusive provider of an end user’s local exchange service.⁶² The loop-transport combinations must terminate at the requesting carrier’s collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC’s tariffed services. Under this option, the requesting carrier is the end user’s only local service provider, and thus, is providing more than a significant amount of local exchange service. The carrier can then use the loop-transport combinations that serve the end user to carry any type of traffic, including using them to carry 100 percent interstate access traffic; or
- (2) The requesting carrier certifies that it provides local exchange and exchange access service to the end user customer’s premises and handles at least one third of the end user customer’s local traffic measured as a percent of total end user customer local

⁶⁰ E.g., *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, et al.*, CC Docket Nos. 96-262, 94-1, First Report and Order, 12 FCC Rcd 15982, 16101-04, paras. 277-82 (1997).

⁶¹ *Id.* at 16101, para. 279.

⁶² *Supplemental Order* at n.9.

dialtone lines; and for DS1 circuits and above,⁶³ at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually,⁶⁴ and the entire loop facility has at least 10 percent local voice traffic. When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level),⁶⁵ each of the individual DS1 circuits must meet this criteria.

The loop-transport combination must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services.

Under this option, a carrier's provision of at least one third of an end user's local traffic is significant because it indicates that the carrier is providing more than a de minimis amount, but less than all, of the end user's local service. As we stated above, we find this to be a reasonable indication that the requesting carrier has taken affirmative steps to provide local exchange service to the end user, and is not using the facilities solely to bypass special access service. Such a carrier may then use unbundled loop-transport combinations to serve the customer as long as the active channels on the facility, and the entire facility, are being used to provide the amount of local exchange service specified in this option, thereby offering the carrier some flexibility to use the combinations to provide other services besides local exchange service; or

- (3) The requesting carrier certifies that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic, and that the entire loop facility has at least 33 percent local voice traffic. When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet this criteria. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, collocation is not required. The requesting carrier does not need to provide a defined portion of the end user's local service, but the active channels on any loop-transport combination, and the entire facility, must carry the amount of local exchange traffic specified in this option. This option may be the most efficient for requesting carriers that provide high capacity facilities to large end users that carry a significant amount of local voice traffic, but that represent only a small

⁶³ A DS1 circuit contains 24 voice-grade channels.

⁶⁴ Traffic is local if it is defined as such in a requesting carrier's state-approved local exchange tariff and/or it is subject to a reciprocal compensation arrangement between the requesting carrier and the incumbent LEC. This is consistent with the Commission's statement in the *Local Competition First Report and Order* that state commissions have the authority to determine what geographic areas should be considered "local areas" for purposes of applying reciprocal compensation arrangements, consistent with their historical practice of defining local service areas for local exchange carriers. *Local Competition First Report and Order*, 11 FCC Rcd at 16013, para. 1035.

⁶⁵ A DS3 circuit contains 24 DS1s. A DS1 circuit that is multiplexed to the DS3 level passes through electronic equipment that allows the signals carried on the DS1 to be consolidated on to the DS3.

portion of the end user's total local exchange service. This option recognizes that although the requesting carrier is not providing one-third of the end user's local voice service, as set forth in option 2, the carrier has still taken affirmative steps to provide local service to the customer, and is not using the circuits simply to bypass special access. As the record indicates, while such a carrier may not be providing a significant amount of the customer's total local service, the 50 percent facility threshold indicates that a significant portion of the service that the carrier does provide to the end user is local.⁶⁶

23. We clarify that the three alternative circumstances described above represent a safe harbor for determining the minimum amount of local exchange service that a requesting carrier must provide in order for it to be deemed "significant." We acknowledge that there may be extraordinary circumstances under which a requesting carrier is providing a significant amount of local exchange service but does not qualify under any of the three options. In such a case, the requesting carrier may always petition the Commission for a waiver of the safe harbor requirements under our existing rules.⁶⁷

24. We find that the limited collocation requirements contained in local usage options 1 and 2 are reasonable. They are consistent with both the *Third Report and Order*, in which we stated that any requesting carrier that is collocated in a serving wire center is free to order loops and transport to that serving wire center as unbundled network elements,⁶⁸ and with the *Supplemental Order*, in which we referred to a requesting carrier's provision of local exchange service terminating at a collocation arrangement as an example of significant local usage.⁶⁹ We also stated in the *Third Report and Order* that the Commission expected that it would be most efficient for the incumbent LEC to connect unbundled loop-transport combinations directly to a requesting carrier's collocation cage.⁷⁰ Finally, the collocation requirements contained in options 1 and 2 should not impose an undue burden on requesting carriers because they require only that the circuit that the requesting carrier seeks to convert terminate at a single collocation arrangement in the incumbent LEC's network.⁷¹

⁶⁶ Letter from Susanne A. Guyer, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 2 (filed Apr. 11, 2000) (*Bell Atlantic Apr. 11, 2000 Letter*).

⁶⁷ 47 C.F.R. § 1.3.

⁶⁸ *Third Report and Order*, 15 FCC Rcd at 3912, para. 486

⁶⁹ *Supplemental Order* at n.9.

⁷⁰ See *Third Report and Order*, 15 FCC Rcd at 3831, para. 298.

⁷¹ See *February 28, 2000 Joint Letter* at 2 (stating in options 1 and 2 that "the loop/transport combination originates at a customer's premises and terminates at the telecommunications carrier's collocation arrangement."); Letter from Melissa Newman, Vice President – Federal Regulatory, US West, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, at 2 (filed Apr. 13, 2000) (*US West Apr. 13, 2000 Letter*) ("US (continued....)

25. We do not adopt MCI WorldCom's proposal that incumbent LECs should presume that any circuit that a requesting carrier connects to a port on a "Class 5" switch or its equivalent is used exclusively to provide local service.⁷² There is no basis to assume that every circuit that terminates in a certain type of switch is being used exclusively for local traffic, and for circuits that are multiplexed into larger capacity facilities, which are often the circuits that carriers seek to convert to unbundled loop-transport combinations, there may be no way to determine whether an individual line actually terminates into a particular switch.⁷³ We also do not believe that we should regulate the type of equipment that a carrier must use while the temporary constraint is in effect.

26. We also do not adopt MCI WorldCom's proposal that we deem a circuit carrying at least ten percent local traffic to be carrying a significant amount of local traffic. It argues that this approach is consistent with the Commission's rules under which the revenues and costs generated by a special access circuit carrying at least ten percent interstate traffic are classified as "interstate."⁷⁴ As the Commission has stated, the amount of interstate traffic carried on a circuit is deemed to be de minimis if it amounts to ten percent or less of the total traffic on a special access line.⁷⁵ Because the Commission has found the ten percent threshold to represent a de minimis, not a significant, amount of traffic, we will not use this rule to determine significant local usage.

27. We do not adopt CompTel's proposal for significant local usage under which requesting carriers would be able to request wholesale conversions of special access circuits if (a) the carrier is certified as a competitive LEC and reports that at least 70 percent of its revenues reported to the Universal Service Fund Administrator are local, or (b) the special access arrangements are used to provide services that are "priced to attract (and are capable of completing) the customer's local usage," or (c) the carrier certifies that the special access arrangements are used for the completion of local calls, or (d) the special access arrangements are

(Continued from previous page) _____

West also emphasized that the collocation requirement is not burdensome because a requesting carrier only needs one collocation arrangement per switch it places in service").

⁷² *MCI WorldCom Mar. 22, 2000 Letter* at 9. Some carriers use circuit switches with a "Class 5" designation to provide local exchange service.

⁷³ *See Bell Atlantic Apr. 11, 2000 Letter*, Attachment at 3.

⁷⁴ Letter from Chuck Goldfarb, Director Law and Public Policy, MCI WorldCom, to Larry Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98, at 9-10 (filed Apr. 4, 2000) (*MCI WorldCom Apr. 4, 2000 Letter*). MCI WorldCom proposed subsequently that we find that a requesting carrier is providing a significant amount of local exchange service if 25 percent or more of the activated channels on a DS-1 facility are used for local service. It based this proposal on an analysis of the costs and benefits associated with a requesting carrier converting some of the DS-0 channels on a DS-1 circuit to local usage. Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 2 (filed Apr. 28, 2000). This proposal appears highly dependent on a carrier's individual costs and does not enable the Commission to verify that a requesting carrier is providing a significant amount of local exchange service to a particular end user.

⁷⁵ *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, 5660-61 (1989).

used to provide data services.⁷⁶ It also argues that incumbent LECs that provide interexchange services in a certain market must make unbundled loop-transport combinations available to requesting carriers in that market regardless of whether the requesting carrier is providing any local exchange service to the end user.⁷⁷ We reject these proposals because they offer no way to verify whether a requesting carrier is providing any specified amount of local service. In addition, its proposal to allow unconstrained use of unbundled loop-transport combinations in markets in which the incumbent LEC provides interexchange service does not allow us to preserve the status quo while we consider the issues in the *Fourth FNPRM*. Instead, the three options described above provide a reasonable threshold for determining whether a carrier has taken affirmative steps to provide local service. They are also verifiable for both the requesting carrier and the incumbent LEC and prevent parties from gaming implementation of the interim requirements. While CompTel expresses a concern about incumbent LECs being both an input supplier and a retail competitor in the interexchange market, the temporary constraint, as we explain above, should not allow incumbent LECs that provide in-region long distance service to engage in anticompetitive behavior.⁷⁸

28. We further reject the suggestion that we eliminate the prohibition on “co-mingling” (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.⁷⁹ We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXC's solely or primarily to bypass special access services. We emphasize that the co-mingling determinations that we make in this order do not prejudice any final resolution on whether unbundled network elements may be combined with tariffed services. We will seek further information on this issue in the Public Notice that we will issue in early 2001.

29. We clarify that incumbent LECs must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements.⁸⁰ We do not believe it is necessary to address the precise form that such a certification must take, but we agree with ALTS that a letter sent to the incumbent LEC by a

⁷⁶ With regard to data services, we note that the local usage options we adopt do not preclude a requesting carrier from providing data over circuits that it seeks to convert, as long as it meets the thresholds contained in the options.

⁷⁷ Letter from Jonathan D. Lee, Vice President, Regulatory Affairs, CompTel, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed Apr. 27, 2000) (*CompTel Apr. 27, 2000 Letter*). Sprint supports CompTel's proposal except for the requirement that incumbent LECs that provide interexchange services in a certain market make unbundled loop-transport combinations available to requesting carriers in that market regardless of whether the requesting carrier is providing any local exchange service to the end user. Letter from Richard Juhnke, General Attorney, Sprint, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, at 1 (filed May 2, 2000).

⁷⁸ *CompTel Apr. 27, 2000 Letter* at 2.

⁷⁹ *See MCI WorldCom Apr. 4, 2000 Letter* at 6-8; *February 28, 2000 Joint Letter* at 2.

⁸⁰ *See Supplemental Order* at n.9.

requesting carrier is a practical method of certification.⁸¹ The letter should indicate under what local usage option the requesting carrier seeks to qualify. In order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options. We stated in the *Supplemental Order* that we did not believe it was necessary to allow auditing because the temporary constraint on combinations of unbundled loop and transport network elements was so limited in duration.⁸² Because we are extending the temporary constraint, we find that it is reasonable to allow the incumbent LECs to conduct limited audits.

30. We agree with ALTS that once a requesting carrier certifies that it is providing a significant amount of local exchange service, the process by which special access circuits are converted to unbundled loop-transport combinations should be simple and accomplished without delay.⁸³ We stated in the *Third Report and Order* that incumbent LECs and requesting carriers have developed routine provisioning procedures that can be used to deploy unbundled loop-transport combinations using the Access Service Request process, a process that carriers have used historically to provision access circuits.⁸⁴ Under this process, the conversion should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested. We continue to believe that the Access Service Request process will allow requesting carriers to avoid material provisioning delays and unnecessary costs to integrate unbundled loop-transport combinations into their networks, and expect that carriers will use this process for conversions.

31. We agree with MCI WorldCom that upon receiving a conversion request that indicates that the circuits involved meet one of the three thresholds for significant local usage that the incumbent LEC should immediately process the conversion.⁸⁵ We emphasize that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements.⁸⁶ There is broad agreement

⁸¹ See *ALTS March 24, 2000 Letter* at 13.

⁸² See *Supplemental Order* at n.9

⁸³ *ALTS March 24, 2000 Letter* at 13.

⁸⁴ See *Third Report and Order*, 15 FCC Rcd at 3831, para. 298, n.581. ALTS states that the Access Service Request process has been adopted by industry consensus in New York. *ALTS March 24, 2000 Letter* at 13.

⁸⁵ *MCI WorldCom Apr. 4, 2000 Letter* at 9.

⁸⁶ The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. *February 28, 2000 Joint Letter* at 3. We agree that this should be the only time that an incumbent LEC should request an audit.

among the incumbent LECs and the competitive LECs on auditing procedures. In particular, parties agree that incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options.⁸⁷ In order to reduce the burden on requesting carriers, we find that incumbent LECs must provide at least 30 days written notice to a carrier that has purchased a combination of unbundled loop and transport network elements that it will conduct an audit, and may not conduct more than one audit of the carrier in any calendar year unless an audit finds non-compliance. We agree with Bell Atlantic that at the same time that an incumbent LEC provides notice of an audit to the affected carrier, it should send a copy of the notice to the Commission.⁸⁸ While the Commission will not take action to approve or disapprove every audit, the notices will allow us to monitor implementation of the interim requirements.

32. We expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification. For example, US West points out that records that demonstrate that a requesting carrier's unbundled loop-transport combination is configured to provide local exchange service should be adequate to support the carrier's certification without the need for extensive call detail records.⁸⁹ We emphasize that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records, and find that, in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business. We will not require specifically that incumbent LECs and requesting carriers follow the other auditing guidelines contained in the *February 28, 2000 Joint Letter*. As the parties indicate, in many cases, their interconnection agreements already contain audit rights.⁹⁰ We do not believe that we should restrict parties from relying on these agreements.

33. We note that the requirements in this order will take effect immediately upon publication in the Federal Register. We find good cause for doing so because they will allow incumbent LECs to promptly process requests from requesting carriers for access to unbundled loop-transport combinations, and provide the industry with more clearly defined standards for using combinations during the interim period prior to our resolution of the *Fourth FNPRM*.

IV. PROCEDURAL ISSUES: FINAL REGULATORY FLEXIBILITY CERTIFICATION

34. The Regulatory Flexibility Act (RFA)⁹¹ requires that regulatory flexibility analyses

⁸⁷ See, e.g., *February 28, 2000 Joint Letter* at 3; *ALTS March 24, 2000 Letter* at 12; *MCI WorldCom Apr. 4, 2000 Letter* at 10.

⁸⁸ *Bell Atlantic Apr. 11, 2000 Letter* at 3.

⁸⁹ *US West Apr. 13, 2000 Letter* at 1.

⁹⁰ *February 28, 2000 Joint Letter* at 3.

⁹¹ The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

be prepared for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” See 5 U.S.C. § 605(b). The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” See 5 U.S.C. § 601(6). In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. See 5 U.S.C. § 601(3). A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). See 15 U.S.C. § 632. SBA rules provide that for establishments providing “Telephone Communications Except Radiotelephone,” which is Standard Industrial Classification (SIC) Code 4813, a small entity is one employing no more than 1,500 persons.

35. This Clarification of the *Supplemental Order* in CC Docket No. 96-98 (Clarification Order) sets out the criteria under which a requesting carrier may use combinations of unbundled network elements to provide exchange access services. The criteria is consistent with several of the Commission’s findings in the *Supplemental Order*.⁹² It also extends the date by which the Commission will resolve its *Fourth FNPRM* from June 30, 2000. Until resolution of the *Fourth FNPRM*, IXC’s are prohibited from converting special access services that they purchase from the Bell Operating Companies or other incumbent local exchange carriers to combinations of unbundled loops and transport network elements unless they meet the designated criteria. This clarification therefore pertains directly to IXC’s, and indirectly to Bell Operating Companies (BOCs), other incumbent local exchange carriers, competitive local exchange carriers, and competitive access providers.

36. We certify that this clarification of the *Supplemental Order* will not have a significant economic impact on a substantial number of small entities because it maintains the status quo regarding the ability of IXC’s to purchase special access services for a longer period of time. It also maintains the status quo for any small incumbent local exchange carriers from which interexchange carriers purchase special access services. The Clarification Order also allows some limited auditing by incumbent local exchange carriers to determine whether IXC’s that use combinations of unbundled network elements meet the established criteria in the Order. This limited auditing will not have a significant economic impact on a substantial number of small entities because any incumbent LEC that chooses to voluntarily exercise its limited auditing rights will bear all expenses associated with any resulting audit. The Commission has also required that audits be conducted based on the records that a small carrier keeps in the normal course of business. The Commission will send a copy of the Clarification Order, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Clarification Order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. See 5 U.S.C. § 605(b).

92*Supplemental Order* at n.9.

V. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1,3,4,201-205, 251, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), the Commission clarifies the *Supplemental Order* as set out above.

38. IT IS FURTHER ORDERED that the requirements in this order will become effective immediately upon publication in the Federal Register.

39. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Supplemental Order Clarification, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

**SEPARATE STATEMENT OF
CHAIRMAN WILLIAM E. KENNARD**

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification, CC Docket 96-98.

In his dissenting statement, Commissioner Furchtgott-Roth has suggested that there is a close linkage between questions in this docket and those in a docket considering reform of universal service and interstate access charges.¹ The dissenting statement suggests, incorrectly, that the public has been unaware of any overlapping policy considerations that may exist among the issues in the two dockets, and he has concluded that the public “had no opportunity to comment meaningfully on this issue.” I concur in the observation that certain policy considerations are relevant to both dockets. Where I disagree with the dissent is in his perception that the public was unaware of any commonality of policy issues between the dockets. I further disagree with the suggestion that the determination to defer final resolution of the matters in the instant docket was somehow tainted by consideration of policy questions common to both proceedings.

First, the Commission’s Local Competition Third Report and Order and Fourth Further Notice of Proposed Rulemaking (FNPRM) in this docket advised the public, very directly, that allowing requesting carriers to use unbundled network elements solely to provide exchange access service would have significant policy ramifications.² The Commission stated in those decisions that our determinations regarding the substitution of combinations of unbundled network elements for special access service could significantly reduce the incumbent LECs’ special access revenues prior to full implementation of access charge and universal service reform.³ In seeking comment on the policy implications that such a significant reduction would cause, the Commission expressly cited our access charge reform proceeding and noted the relationship between that proceeding and universal service concerns.⁴

The overlapping policy considerations between the two dockets was not lost upon commenters. In fact, MCI expressly requested that its comments addressing the CALLS proposal be made part of the record in this docket, initiated by the Fourth FNPRM, emphasizing that the public should be able to comment on the connection between the special access and CALLS issues.⁵ We agreed, and those comments are contained in the

¹ *Access Charge Reform; Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Notice of Proposed Rulemaking (rel. Sept. 15, 1999).

² *Third Report and Order and Fourth FNPRM*, 15 FCC Red at 3912-15, paras. 485, 489, 494-96.

³ *Id.* at 3913, 3915, paras. 489, 496.

⁴ *Id.* at 3915, para. 496 & n.994.

⁵ Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 5-7 (filed Apr. 6, 2000).

record of both proceedings. It is therefore not surprising that, in the record in this docket, several commenters argued that allowing carriers to substitute combinations of unbundled network elements for special access service could affect the ability of the CALLS plan to reform access charges in a predictable, efficient manner.⁶ Recognizing the link between special access and switched access, commenters also expressed concern that allowing the use of combinations of unbundled network elements for special access could undercut universal service by inducing carriers to abandon switched access for unbundled network element-based special access.⁷ In short, there is no merit to the suggestion that the public was ignorant of the policy considerations common to both dockets.

Finally, I reject Commissioner Furchtgott-Roth's passing suggestion that the CALLS proceedings have improperly "tainted" the Commission's proceedings in this docket. The Order we release today speaks for itself, and it rests on several explicit legal grounds. The most prominent of those is our determination that, in considering whether loop-transport combinations meet the "impairment" standard with respect to the exchange access market, we should first take into account the market effects of the comprehensive unbundling rules that we adopted last fall and that did not become effective until this year. Commissioner Furchtgott-Roth barely addresses our "impairment" analysis on the merits, even though that analysis amply justifies our decision to extend the interim constraint at issue, quite apart from additional concerns about the massive industry dislocations that could result from an immediate lifting of that constraint. I am happy to rest on the reasoning set forth in the Order, and, in the proceedings that follow, I encourage all interested parties to help us fine-tune our implementation of Section 251(d)(2) in the wake of the Supreme Court's decision in *Iowa Utils. Bd. v. FCC*.⁸

Commissioner Furchtgott-Roth apparently expects the Bureau and this Commission to put blinders on and ignore policy considerations that may be relevant to both dockets. While it is true that blinders can help a horse race faster by shielding distractions from its view, we need to see the entire landscape to get to where we want to be. This isn't a race. Time helps, not hurts, our thinking here.

⁶ GTE Comments at 20-22; GTE Reply Comments at 13-14; National Exchange Carrier Association, Inc., National Rural Telecom Association, National Telephone Cooperative Association, and Organization for the Promotion and Advancement of Small Telecommunications Companies Joint Reply Comments at 7; Cf. Sprint Reply Comments at 9-10.

⁷ See, e.g. Bell Atlantic Reply Comments at 5; GTE Reply Comments at 9.

⁸ 119 S. Ct. 721 (1999).

**Separate Statement of
Commissioner Susan Ness**

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification (CC Docket No. 96-98)

I support the steps we have taken to clarify further the interim requirement that a carrier provide a significant amount of local service in order to convert special access services to unbundled network elements. This clarification should reduce disputes by providing a safe harbor for carriers to satisfy this interim requirement. Some carriers however, have indicated that there may be situations in which a carrier is providing a significant amount of local service, but does not fit within any of the safe harbors in this order. As we state in this order, such carriers may petition the Commission for a waiver. Given that this is an interim rule, I would have preferred to adopt a more streamlined waiver process, enabling the Commission to rule on any waiver requests within a short period of time. Nonetheless, I would urge the Commission to act on any such requests as expeditiously as possible.

**DISSENTING STATEMENT OF COMMISSIONER HAROLD
FURCHTGOTT-ROTH**

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification, CC Docket 96-98.

This order is procedurally and substantively at odds with the law that Congress has directed this agency to follow. My chief criticism of this decision is that it, like the recently initiated depreciation waiver proceeding, is an integral – but unacknowledged – part of the deal that was struck between the Commission and a select group of parties to the “CALLS negotiations” that were held in January and February of this year. Contrary to Chairman Kennard’s separate statement, I do not dispute that there may be “policy considerations” relevant to both dockets. Rather, I object to the Commission’s allowing the outcome in this proceeding to become a bargaining chip in what was publicly advertised as an entirely separate proceeding.

This Order Is Illegitimately Linked to the CALLS Negotiations. This order – like the Further Notice of Proposed Rulemaking that the Commission recently issued regarding incumbent local exchange carriers’ requests for waivers from this agency’s depreciation requirements¹ – is essentially an outgrowth of negotiations between the Commission, acting chiefly through the Common Carrier Bureau, and the Coalition for Affordable Local and Long Distance Service (“CALLS”). A brief description is in order. Last summer, the Coalition submitted to the Commission a proposal for reforming universal service and interstate access charges, and the Commission sought comment on this proposal. See Notice of Proposed Rulemaking, *Access Charge Reform, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 92-262, 94-1, 99-249, 96-45 (Sept. 15, 1999).

Rather than simply render a decision on the CALLS proposal based on comments submitted by interested parties, the Commission instead set itself up as a sort of referee of negotiations between a small, select group of some – but by no means all – of the parties with interests in this proceeding, including the members of the Coalition and groups purporting to represent consumer interests. In the early part of this year, a series of meetings between these parties and the Bureau were held. The substance of what was discussed at these meetings was not made

¹ Further Notice of Proposed Rulemaking, *1998 Biennial Regulatory Review -- Review Of Depreciation Requirements For Incumbent Local Exchange Carriers, Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, et al.*, CC Docket Nos. 98-137, 99-117 (Rel. Apr. 3, 2000).

public, nor were a number of parties with interests in the outcome of this proceeding (including the Ad Hoc Telecommunications Users Committee, Time Warner Telecom, and the Association for Local Telecommunications Services) allowed to participate in these discussions. Although the Commission could legally have attempted to narrow the differences between the various parties with interests in this docket in advance of a formal rulemaking proceeding by following the framework set forth in the Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq.*,² it ignored that statute completely.

At some point in this process, proceedings in separate dockets, unrelated to the issue of switched access charge reform, became part of the negotiations. Incumbent local exchange carrier members of the Coalition apparently contended that they could not commit to certain modifications of the CALLS proposal unless they had confidence that two separate matters – one relating to the Commission’s depreciation requirements and this special access proceeding – would be resolved favorably to them. As a consequence, part of the final agreement reached by the participants to the CALLS negotiations concerned these separate matters. The Bureau agreed to recommend to the Commission that it approve the incumbents’ applications for a modification to the depreciation waiver requirements and terminate the CPR audits. Additionally, the Bureau agreed to recommend to the Commission that the Commission “clarify” the existing rules regarding special access and defer further rulemaking until 2001.

The linkage between the depreciation and special access items was utterly clear – at least internally. Indeed, to brief the Commissioners and their staff on the outcome of the CALLS negotiations, the Bureau distributed briefing sheets describing different aspects of the CALLS deal, two of which were entitled “CALLS – Depreciation” and “CALLS – Special Access.” The special access briefing sheet stated that the special access rulemaking posed particular financial problems for the ILECs, because they could be hit twice with significant revenue losses due to regulatory action, given that the CALLS proposal required the LECs to make a substantial reduction in access charges this year, and this special access proceeding put a significant amount of annual special access revenues at risk without a possibility to recoup the lost revenues with a low-end adjustment. The briefing sheet went on to say that incumbent carriers initially felt that they could

² Section 563 of this statute provides for the establishment of a committee that, with the assistance of the relevant agency, will negotiate to reach a consensus on a given issue. An agency that undertakes a negotiated rulemaking must publish in the Federal Register a notice that, among other things, (1) announces the establishment of the committee; (2) describes the issues and scope of the rule to be developed; and (3) proposes a list of persons that will participate on the committee. 5 U.S.C. § 564(a). In addition, the agency must give persons with interests that will be affected by the new rule an opportunity to apply to participate in the negotiated rulemaking process. *Id.* § 564(b).

not agree to the CALLS proposal given the uncertainty relating to the special access issue, and therefore proposed that the Commission deal first with the special access issue, and then the CALLS proposal.

According to the briefing sheet, the Bureau objected to the incumbent carriers' original proposal because it might prevent the implementation of CALLS by July 1 and because with the overhang of a pending CALLS order, the credibility of a decision on the special access issue could be undercut. As a compromise, the ILECs were willing to postpone resolution of the special access rulemaking for a year, but wanted the Commission to clarify the meaning of the term "significant amount of local exchange service," which it used in the November 1999 Supplemental Order in this docket. In the briefing sheet, the Bureau embraced the incumbent carriers' position, recommending that the Commission "clarify" the existing supplemental order to provide a more detailed definition of "significant amount of local exchange service" and defer the further rulemaking until 2001. It therefore comes as no surprise whatsoever to find the Commission a few months later taking precisely this course.

Given these facts, it is simply not plausible to think of this order as anything but a part of the CALLS deal, although the order itself nowhere acknowledges the connection between these two dockets. Under these circumstances, even if I agreed with its substance, which I do not, I would be unable to join this order. The public generally has never been made aware that the outcome of the CALLS proposal hinged on the Commission's resolution of this item, and it therefore had no opportunity to comment meaningfully on this issue. Equally disturbing is the failure of this Commission to maintain the strict neutrality demanded of an agency engaged in rulemaking. Its participation in the CALLS negotiations, however well-meaning, has improperly influenced its decision in a separate docket. The order here is ineradicably tainted by the Commission's participation in the CALLS negotiations, and the process by which this order has been adopted falls short of the principles of openness and transparency that should govern the behavior of all administrative agencies.

Chairman Kennard, in his separate statement, asserts that the Commission has simply considered "overlapping policy considerations" between these separate dockets.³ To think otherwise, he claims, is "to put blinders on" to avoid "seeing

³ The Chairman asserts that five parties submitted comments that "recogniz[ed] the link between special access and switched access," which he suggests demonstrates that the public was aware of the "policy considerations" common to both dockets. Notably, three of these commenters (Bell Atlantic, GTE, and Sprint) were members of the Coalition, and therefore well aware of the link that the Commission had drawn internally between these two proceedings. And it is not surprising that MCI and the National Exchange Carriers Association, *et al.*, persons that appear frequently in matters before the Commission, may have gotten wind of the connection between (continued....)

the entire landscape,” preventing the Commission from “get[ting] where we want to be.” But these metaphors apply far more aptly to the Commission itself. By shielding from public scrutiny the totality of the deal it made with a select group of parties with interests in the CALLS proposal, it is the Commission that wishes to blind the public to the “entire landscape.” I certainly have no objection to the Commission’s trying to reach a desirable outcome. I would simply like for us to reach our goals through a forthright process that is consistent with the law.

The Use Restrictions that the Commission Places on the Enhanced Extended Link Are Inconsistent with the Statute. The Commission postpones yet again a decision on how to solve a problem created by last year’s *UNE Remand Order*,⁴ which requires incumbent local exchange carriers to offer loop/transport combinations as unbundled network elements. Incumbent carriers are concerned that competitors will purchase these combinations, at TELRIC rates, and offer the combinations to customers as a substitute for the existing special access services that they currently purchase, at tariffed rates subject to price-cap regulation, from incumbents. Various parties have urged the Commission to restrict the uses to which competitors may put these combinations, in order to prevent competitors from undercutting the prices charged for special access services. In two orders issued last year, the Commission imposed “interim” restrictions on the ways in which carriers could use the loop/transport combinations and postponed deciding whether such restrictions were consistent with the statute. This order again postpones finally resolving the issue.

I disagree with the Commission’s decision in two key respects. *First*, I believe that postponing a decision on the merits of this issue violates the timetable for establishing unbundling requirements set forth in the 1996 Act. Specifically, the statute requires the Commission to implement section 251’s requirements expeditiously, thereby giving carriers certainty regarding their obligations and rights under the 1996 Act. *See* 47 U.S.C. § 251(d)(1) (“Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.”). Since 1996, the Commission has ignored this statutory directive with respect to this special access issue. In the *Local Competition First Report & Order*,⁵ it refused to resolve the problem and instead

(Continued from previous page) —————
this docket and the CALLS proceeding. MCI has, of course, also challenged the propriety of the process by which the Commission conducted the CALLS negotiations.

⁴ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98 (rel. Nov. 5, 1999).

⁵ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499 (1997) (hereinafter *Local Competition First Report and Order*).

asked interested parties to submit comments. It punted again last fall, when it ruled that the record needed further development in order for it to resolve the issue.

Yet again, the Commission avoids answering this question. It claims to need more time to “compile an adequate record for addressing the legal and policy disputes presented here.” *Supplemental Order Clarification* ¶ 1. I do not understand why. Both the *Local Competition First Report & Order* and last year’s *UNE Remand Order* asked parties to comment on whether there is any statutory basis for “limiting an incumbent LEC’s obligation to provide entrance facilities as an unbundled network element.” See *id.* ¶ 495. Interested parties have had a more than adequate opportunity to weigh in on the issue, and to the extent that empirical evidence informs this issue, parties have submitted such data. There is no reason why the Commission cannot answer this question today – no reason, that is, other than the Commission’s agreement with the incumbent carrier members of CALLS that it would delay resolution of this matter until next year. Not only is the Commission’s refusal to decide the matter inconsistent with section 251(d)(1), but also it has led to needless litigation on the issue in the D.C. Circuit. See *Br. of AT&T, AT&T v. FCC*, No. 99-1538 (D.C. Cir.).

Second, I believe that the “interim” use restrictions imposed by this order are at odds with sections 251(c)(3) and 251(d)(2). As the Commission recognized in the *Local Competition First Report and Order*, 11 FCC Rcd 15499, 15679 [¶ 356], section 251(c)(3) places no restriction on the uses to which a requesting carrier may put an unbundled network element. Nor does the Act authorize the Commission to limit the ways in which a requesting carrier may use an incumbent’s network elements. Section 251(c)(3) simply imposes on incumbents the duty to give requesting carriers nondiscriminatory access to unbundled network elements “for the provision of a telecommunications service.” 47 U.S.C. § 251(c)(3). Thus, so long as a competitor uses unbundled network elements to provide “a telecommunications service” – and exchange access service is inarguably a telecommunications service – that use is permissible under section 251(c)(3).

The Commission now suggests that a use restriction could be based on language in section 251(d)(2), which provides that the Commission, in determining whether a network element should be unbundled, must consider whether lack of access to that element “would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer.” See *Supplemental Order Clarification* ¶ 17 (citing 47 U.S.C. § 251(d)(2)(B)). The Commission’s reasoning stretches the language of this provision past the breaking point. The straightforward way to apply this subsection is first to identify the service the requesting carrier “seeks to offer” and then to determine whether lack of access to a given network element would “impair” the carrier’s ability to provide that service. There is no basis in section 251(d)(2)(B) for then layering restrictions on the requesting carrier’s use of the network element.

If there is a problem here, the solution lies not in coming up with detailed and hard-to-enforce definitions of “significant amount of local usage.” Instead, the Commission should confront the real problem: whether local transport should be unbundled in all circumstances or whether its UNE pricing rules make sense. I urge the parties to this proceeding to build a record that addresses these issues, rather than urge the Commission to perpetuate its misguided use restrictions.

COMMISSION DIRECTIVE

ADMINISTRATIVE DEPT. _____ DATE August 7, 2001
TRANSPORTATION DEPT. _____ DOCKET NO. 98-216-C
UTILITIES DEPT. XXX ORDER NO. _____

Approval of renegotiated interconnection agreement between BellSouth and NewSouth Communications Corporation. Discuss with Commission receipt of request for approval of this agreement which includes rates, terms and conditions concerning Resale, Collocation and the purchase of Unbundled Network Elements so as to enable NewSouth to offer competitive telecommunications services within BellSouth's local service areas. NewSouth was certified to provide local telecommunications services within South Carolina under Docket No. 97-467-C.

COMMISSION APPROVAL:

Approve Renegotiated Interconnection Agreement between BellSouth Telecommunications, Inc. and NewSouth Communications, Corp.

APPROVED ✓

PRESIDING Saunders

APPROVED STC 30 DAYS _____

ATKINS ✓

ACCEPTED FOR FILING _____

BRADLEY Absent

DENIED _____

CARRUTH ✓

AMENDED _____

CLYBURN ✓

TRANSFERRED _____

MITCHELL M

SUSPENDED _____

MOSELEY ✓

CANCELED _____

SAUNDERS ✓

SET FOR HEARING _____

REGULAR SESSION ✓

ADVISED _____

SPECIAL SESSION _____

CARRIED OVER _____

TIME OF SESSION 10:30 AM

RECORDED BY MT

*MT
8/13/01
DSL*

By and Between
BellSouth Telecommunications, Inc.
And
NewSouth Communications, Corp.

TABLE OF CONTENTS

General Terms and Conditions

1. Definitions
2. Term of the Agreement
3. Operational Support Systems
4. Parity
5. White Pages Listings
6. Bona Fide Request/New Business Request Process for Further Unbundling
7. Court Ordered Requests for Call Detail Records and Other Subscriber Information
8. Liability and Indemnification
9. Intellectual Property Rights and Indemnification
10. Proprietary and Confidential Information
11. Assignments
12. Resolution of Disputes
13. Taxes
14. Force Majeure
15. Adoption of Agreements
16. Modification of Agreement
17. Non-waiver of Legal Rights
18. Severability
19. Waivers
20. Governing Law
21. Arm's Length Negotiations
22. Notices
23. Rule of Construction
24. Headings of No Force or Effect
25. Multiple Counterparts
26. Implementation of Agreement
27. Filing of Agreement
28. Compliance with Applicable Law
29. Necessary Approvals
30. Good Faith Performance
31. Nonexclusive Dealings
32. Survival
33. Entire Agreement

Attachment 1 - Resale

Attachment 2 - Network Elements and Other Services

Attachment 3 - Network Interconnection

Attachment 4 - Physical Collocation

Attachment 5 - Access to Numbers and Number Portability

Attachment 6 – Pre-Ordering, Ordering and Provisioning, Maintenance and Repair

Attachment 7 - Billing and Billing Accuracy Certification

Attachment 8 - Rights-of-Way, Conduits and Pole Attachments

Attachment 9 - Performance Measurements

Attachment 10- Agreement Implementation Template

Attachment 11- BellSouth Disaster Recovery Plan

Attachment 12-Bona Fide Request and New Business Requests Process

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., (“BellSouth”), a Georgia corporation, and NewSouth Communications, Corp., (“NewSouth”) a Delaware corporation, and shall be deemed effective as of the date of the last signature of both Parties (“Effective Date”). This Agreement may refer to either BellSouth or NewSouth or both as a “Party” or “Parties.”

WITNESSETH

WHEREAS, BellSouth is an Incumbent Local Exchange Telecommunications Company (ILEC) authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee; and

WHEREAS, NewSouth is or seeks to become a Competitive Local Exchange Telecommunications Company (“CLEC”) authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, the Parties wish to resell BellSouth’s telecommunications services and/or interconnect their facilities, purchase network elements and other services, and exchange traffic specifically for the purposes of fulfilling their obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996 (“the Act”).

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and NewSouth agree as follows:

1. Purpose

The Parties agree that the rates, terms and conditions contained within this Agreement, including all Attachments, comply and conform with each Parties' obligations under sections 251 and 252 of the Act. The resale, access and interconnection obligations contained herein enable NewSouth to provide competing telephone exchange service to residential and business subscribers within the territory of BellSouth. The Parties agree that NewSouth will not be considered to have offered telecommunications services to the public in any state within BellSouth’s region until such time as it has ordered services for resale or interconnection facilities for the purposes of providing business and/or residential local exchange service to customers.

2. Term of the Agreement

- 2.1 The term of this Agreement shall be two years, beginning on the Effective Date and shall apply to the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. If as of the expiration of this Agreement, a Subsequent Agreement (as defined in Section 2.2 below) has not been executed by the Parties, this Agreement shall continue on a month-to-

month basis while a Subsequent Agreement is being negotiated. The Parties' rights and obligations with respect to this Agreement after expiration shall be as set forth in Section 2.4 below.

- 2.2 The Parties agree that by no later than one hundred and eighty (180) days prior to the expiration of this Agreement, they shall commence negotiations with regard to the terms, conditions and prices of resale and/or local interconnection to be effective beginning on the expiration date of this Agreement ("Subsequent Agreement").
- 2.3 If, within one hundred and thirty-five (135) days of commencing the negotiation referred to in Section 2.2 above, the Parties are unable to satisfactorily negotiate new resale and/or local interconnection terms, conditions and prices, either Party may petition the Commission to establish appropriate local interconnection and/or resale arrangements pursuant to 47 U.S.C. 252. The Parties agree that, in such event, they shall encourage the Commission to issue its order regarding the appropriate local interconnection and/or resale arrangements no later than the expiration date of this Agreement. The Parties further agree that in the event the Commission does not issue its order prior to the expiration date of this Agreement, or if the Parties continue beyond the expiration date of this Agreement to negotiate the local interconnection and/or resale arrangements without Commission intervention, the terms, conditions and prices ultimately ordered by the Commission, or negotiated by the Parties, will be effective retroactive to the day following the expiration date of this Agreement.
- 2.4 Notwithstanding the foregoing, in the event that as of the date of expiration of this Agreement and conversion of this Agreement to a month-to-month term, the Parties have not entered into a Subsequent Agreement and either no arbitration proceeding has been filed in accordance with Section 2.3 above, or the Parties have not mutually agreed (where permissible) to extend the arbitration window for petitioning the applicable Commission(s) for resolution of those terms upon which the Parties have not agreed, then either Party may terminate this Agreement upon sixty (60) days notice to the other Party. In the event that BellSouth terminates this Agreement as provided above, BellSouth shall continue to offer services to NewSouth pursuant to the terms, conditions and rates set forth in BellSouth's Statement of Generally Available Terms (SGAT) to the extent an SGAT has been approved by the applicable Commission(s). If any state Commission has not approved a BellSouth SGAT, then upon BellSouth's termination of this Agreement as provided herein, BellSouth will continue to provide services to NewSouth pursuant to BellSouth's then current standard interconnection agreement. In the event that the SGAT or BellSouth's standard interconnection agreement becomes effective as between the Parties, the Parties may continue to negotiate a Subsequent Agreement, and the terms of such Subsequent Agreement shall be effective retroactive to the day following expiration of this Agreement.

3. Ordering Procedures

- 3.1 NewSouth shall provide BellSouth its Carrier Identification Code (CIC), Operating Company Number (OCN), Group Access Code (GAC) and Access Customer Name and Address (ACNA) code as applicable prior to placing its first order.
- 3.2 The Parties agree to adhere to the BellSouth Local Interconnection and Facility Based Ordering Guide and Resale Ordering Guide, as appropriate for the services ordered.
- 3.3 NewSouth shall pay charges for Operational Support Systems (OSS) as set forth in this Agreement in Attachment 1 and/or in Attachment 2, 3, 5 and 7 as applicable.

4. Parity

When NewSouth purchases, pursuant to Attachment 1 of this Agreement, telecommunications services from BellSouth for the purposes of resale to end users, BellSouth shall provide said services so that the services are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to its affiliates, subsidiaries and end users. To the extent technically feasible, the quality of a Network Element, as well as the quality of the access to such Network Element provided by BellSouth to NewSouth shall be at least equal in quality to that which BellSouth provides to itself. The quality of the interconnection between the networks of BellSouth and the network of NewSouth shall be at a level that is equal to that which BellSouth provides itself, a subsidiary, an Affiliate, or any other party. The interconnection facilities shall be designed to meet the same technical criteria and service standards that are used within BellSouth's network and shall extend to a consideration of service quality as perceived by end users and service quality as perceived by NewSouth.

5. White Pages Listings

BellSouth shall provide NewSouth and their customers access to white pages directory listings under the following terms:

- 5.1 Listings. NewSouth shall provide all new, changed and deleted listings on a timely basis and BellSouth or its agent will include NewSouth residential and business customer listings in the appropriate White Pages (residential and business) or alphabetical directories. Directory listings will make no distinction between NewSouth and BellSouth subscribers.
- 5.2 Rates. BellSouth and NewSouth will provide to each other subscriber primary listing information in the White Pages for a non-recurring charge.
- 5.3 Procedures for Submitting NewSouth Subscriber Information are found in BellSouth's Ordering Guide for manually processed listings and in the Local Exchange Ordering Guide for mechanically submitted listings.

- 5.3.1 Notwithstanding any provision(s) to the contrary, NewSouth agrees to provide to BellSouth, and BellSouth agrees to accept, NewSouth's Subscriber Listing Information (SLI) relating to NewSouth's customers in the geographic area(s) covered by this Interconnection Agreement. NewSouth authorizes BellSouth to release all such NewSouth SLI provided to BellSouth by NewSouth to qualifying third parties via either license agreement or BellSouth's Directory Publishers Database Service (DPDS), General Subscriber Services Tariff, Section A38.2, as the same may be amended from time to time. Such CLEC SLI shall be intermingled with BellSouth's own customer listings of any other CLEC that has authorized a similar release of SLI. Where necessary, BellSouth will use good faith efforts to obtain state commission approval of any necessary modifications to Section A38.2 of its tariff to provide for release of third party directory listings, including modifications regarding listings to be released pursuant to such tariff and BellSouth's liability thereunder. BellSouth's obligation pursuant to this Section shall not arise in any particular state until the commission of such state has approved modifications to such tariff.
- 5.3.2 No compensation shall be paid to NewSouth for BellSouth's receipt of NewSouth SLI, or for the subsequent release to third parties of such SLI. In addition, to the extent BellSouth incurs costs to modify its systems to enable the release of NewSouth's SLI, or costs on an ongoing basis to administer the release of NewSouth SLI, NewSouth shall pay to BellSouth its proportionate share of the reasonable costs associated therewith.
- 5.3.3 BellSouth shall not be liable for the content or accuracy of any SLI provided by NewSouth under this Agreement. NewSouth shall indemnify, hold harmless and defend BellSouth from and against any damages, losses, liabilities, demands, claims, suits, judgments, costs and expenses (including but not limited to reasonable attorneys' fees and expenses) arising from BellSouth's tariff obligations or otherwise and resulting from or arising out of any third party's claim of inaccurate NewSouth listings or use of the SLI provided pursuant to this Agreement. BellSouth shall forward to NewSouth any complaints received by BellSouth relating to the accuracy or quality of NewSouth listings.
- 5.3.4 Listings and subsequent updates will be released consistent with BellSouth system changes and/or update scheduling requirements.
- 5.4 Unlisted/Non-Published Subscribers. NewSouth will be required to provide to BellSouth the names, addresses and telephone numbers of all NewSouth customers that wish to be omitted from directories.
- 5.5 Inclusion of NewSouth Customers in Directory Assistance Database. BellSouth will include and maintain NewSouth subscriber listings in BellSouth's Directory Assistance databases at no recurring charge and NewSouth shall provide such Directory Assistance listings at no recurring charge. BellSouth and NewSouth will formulate appropriate procedures regarding lead-time, timeliness, format and content of listing information.

5.6 Listing Information Confidentiality. BellSouth will accord NewSouth's directory listing information the same level of confidentiality that BellSouth accords its own directory listing information, and BellSouth shall limit access to NewSouth's customer proprietary confidential directory information to those BellSouth employees who are involved in the preparation of listings.

5.7 Optional Listings. Additional listings and optional listings will be offered by BellSouth at tariffed rates as set forth in the General Subscriber Services Tariff.

5.8 Delivery. BellSouth or its agent shall deliver White Pages directories to NewSouth subscribers at no charge or as specified in a separate BAPCO agreement.

6. Bona Fide Request/New Business Request Process for Further Unbundling

If NewSouth is a facilities based provider or a facilities based and resale provider, this section shall apply. BellSouth shall, upon request of NewSouth, provide to NewSouth access to its network elements at any technically feasible point for the provision of NewSouth's telecommunications service where such access is necessary and failure to provide access would impair the ability of NewSouth to provide services that it seeks to offer. Any request by NewSouth for access to a network element, interconnection option, or for the provisioning of any service or product that is not already available shall be treated as a Bona Fide Request/New Business Request, and shall be submitted to BellSouth pursuant to the Bona Fide Request/New Business Request process set forth in Attachment 12 of this Agreement

7. Court Ordered Requests for Call Detail Records and Other Subscriber Information

7.1 To the extent technically feasible, BellSouth maintains call detail records for NewSouth end users for limited time periods and can respond to subpoenas and court ordered requests for this information. BellSouth shall maintain such information for NewSouth end users for the same length of time it maintains such information for its own end users.

7.2 NewSouth agrees that BellSouth will respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to NewSouth end users. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request.

7.3 Where BellSouth is providing to NewSouth telecommunications services for resale or providing to NewSouth the local switching function, then NewSouth agrees that in those cases where NewSouth receives subpoenas or court ordered requests regarding

targeted telephone numbers belonging to NewSouth end users, if NewSouth does not have the requested information, NewSouth will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth. Where the request has been forwarded to BellSouth, billing for call detail information will be generated by BellSouth and directed to the law enforcement agency initiating the request.

- 7.4 In all other instances, NewSouth will provide NewSouth end user and/or other customer information that is available to NewSouth in response to subpoenas and court orders for their own customer records. When BellSouth receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to NewSouth end users, BellSouth will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to NewSouth.

8. Liability and Indemnification

- 8.1 BellSouth Liability. BellSouth shall take financial responsibility for its own actions in causing or its lack of action in preventing, unbillable or uncollectible NewSouth revenues.

- 8.2 NewSouth Liability. In the event that NewSouth consists of two (2) or more separate entities as set forth in the preamble to this Agreement, all such entities shall be jointly and severally liable for the obligations of NewSouth under this Agreement.

- 8.3 Liability for Acts or Omissions of Third Parties. Neither BellSouth nor NewSouth shall be liable for any act or omission of another telecommunications company providing a portion of the services provided under this Agreement.

- 8.4 Limitation of Liability.

- 8.4.1 Each Party's liability to the other for any loss, cost, claim, injury or liability or expense, including reasonable attorney's fees relating to or arising out of any negligent act or omission in its performance of this Agreement whether in contract or in tort, shall be limited to a credit for the actual cost of the services or functions not performed or improperly performed.

- 8.4.2 Limitations in Tariffs. A Party may, in its sole discretion, provide in its tariffs and contracts with its Customer and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to Customer or third Party for (i) any Loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such Loss and (ii) Consequential Damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a Loss as a result thereof, such Party shall indemnify and reimburse the

other Party for that portion of the Loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such Loss.

8.4.3 Neither BellSouth nor NewSouth shall be liable for damages to the other's terminal location, POI or other company's customers' premises resulting from the furnishing of a service, including, but not limited to, the installation and removal of equipment or associated wiring, except to the extent caused by a company's negligence or willful misconduct or by a company's failure to properly ground a local loop after disconnection.

8.4.4 Except in cases of gross negligence, willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages, including, but not limited to, economic loss or lost business or profits, damages arising from the use or performance of equipment or software, or the loss of use of software or equipment, or accessories attached thereto, delay, error, or loss of data. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the Services, or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

8.5 Indemnification for Certain Claims. The Party providing services hereunder, its affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim, loss or damage arising from the receiving company's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving company's own communications, or (2) any claim, loss or damage claimed by the customer of the Party receiving services arising from such company's use or reliance on the providing company's services, actions, duties, or obligations arising out of this Agreement.

8.6 Disclaimer. EXCEPT AS SPECIFICALLY PROVIDED TO THE CONTRARY IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER PARTY CONCERNING THE SPECIFIC QUALITY OF ANY SERVICES, OR FACILITIES PROVIDED UNDER THIS AGREEMENT. THE PARTIES DISCLAIM, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR FROM USAGES OF TRADE.

9. Intellectual Property Rights and Indemnification

9.1 No License. No patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. NewSouth is strictly

prohibited from any use, including but not limited to in sales, in marketing or advertising of telecommunications services, of any BellSouth name, service mark or trademark.

- 9.2 Ownership of Intellectual Property. Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel. It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third Parties used in its network that may be required to enable the other Party to use any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.
- 9.3 Indemnification. The Party providing a service pursuant to this Agreement will defend the Party receiving such service or data provided as a result of such service against claims of infringement arising solely from the use by the receiving Party of such service and will indemnify the receiving Party for any damages awarded based solely on such claims in accordance with Section 8 of this Agreement.
- 9.4 Claim of Infringement. In the event that use of any facilities or equipment (including software), becomes, or in reasonable judgment of the Party who owns the affected network is likely to become, the subject of a claim, action, suit, or proceeding based on intellectual property infringement, then said Party shall promptly and at its sole expense, but subject to the limitations of liability set forth below:
- 9.4.1 modify or replace the applicable facilities or equipment (including software) while maintaining form and function, or
- 9.4.2 obtain a license sufficient to allow such use to continue.
- 9.4.3 In the event 9.4.1 or 9.4.2 are commercially unreasonable, then said Party may, terminate, upon reasonable notice, this contract with respect to use of, or services provided through use of, the affected facilities or equipment (including software), but solely to the extent required to avoid the infringement claim.
- 9.5 Exception to Obligations. Neither Party's obligations under this Section shall apply to the extent the infringement is caused by: (i) modification of the facilities or equipment (including software) by the indemnitee; (ii) use by the indemnitee of the facilities or equipment (including software) in combination with equipment or facilities (including software) not provided or authorized by the indemnitor provided the facilities or equipment (including software) would not be infringing if

used alone; (iii) conformance to specifications of the indemnitee which would necessarily result in infringement; or (iv) continued use by the indemnitee of the affected facilities or equipment (including software) after being placed on notice to discontinue use as set forth herein.

- 9.6 Exclusive Remedy. The foregoing shall constitute the Parties' sole and exclusive remedies and obligations with respect to a third party claim of intellectual property infringement arising out of the conduct of business under this Agreement.

10. **Proprietary and Confidential Information**

- 10.1 Proprietary and Confidential Information: It may be necessary for BellSouth and NewSouth, each as the "Discloser," to provide to the other party, as "Recipient," certain proprietary and confidential information (including trade secret information) including but not limited to technical, financial, marketing, staffing and business plans and information, strategic information, proposals, request for proposals, specifications, drawings, prices, costs, procedures, processes, business systems, software programs, techniques, customer account data, call detail records and like information (collectively the Discloser's "Information"). All Information shall be provided to Recipient in written or other tangible or electronic form, clearly marked with a confidential and, proprietary notice. Information orally or visually provided to Recipient must be designated by Discloser as confidential and proprietary at the time of such disclosure and must be reduced to writing marked with a confidential and proprietary notice and provided to Recipient within thirty (30) calendar days after such oral or visual disclosure.

- 10.2 Use and Protection of Information. Recipient shall use the Information solely for the purpose(s) of performing this Agreement, and Recipient shall protect Information from any use, distribution or disclosure except as permitted hereunder. Recipient will use the same standard of care to protect Information as Recipient uses to protect its own similar confidential and proprietary information, but not less than a reasonable standard of care. Recipient may disclose Information solely to the Authorized Representatives of the Recipient who (a) have a substantive need to know such Information in connection with performance of the Agreement; (b) have been advised of the confidential and proprietary nature of the Information; and (c) have personally agreed in writing to protect from unauthorized disclosure all confidential and proprietary information, of whatever source, to which they have access in the course of their employment. "Authorized Representatives" are the officers, directors and employees of Recipient and its Affiliates, as well as Recipient's and its Affiliates' consultants, contractors, counsel and agents. "Affiliates" means any company that is owned in whole or in part, now or in the future, directly or indirectly through a subsidiary, by a party hereto.

- 10.3 Ownership, Copying & Return of Information. Information remains at all times the property of Discloser. Recipient may make tangible or electronic copies, notes, summaries or extracts of Information only as necessary for use as authorized herein. All such tangible or electronic copies, notes, summaries or

extracts must be marked with the same confidential and proprietary notice as appears on the original. Upon Discloser's request, all or any requested portion of the Information (including, but not limited to, tangible and electronic copies, notes, summaries or extracts of any information) will be promptly returned to Discloser or destroyed, and Recipient will provide Discloser with written certification stating that such Information has been returned or destroyed.

- 10.4 Exceptions. Discloser's Information does not include: (a) any information publicly disclosed by Discloser; (b) any information Discloser in writing authorizes Recipient to disclose without restriction; (c) any information already lawfully known to Recipient at the time it is disclosed by the Discloser, without an obligation to keep confidential; or (d) any information Recipient lawfully obtains from any source other than Discloser, provided that such source lawfully disclosed and/or independently developed such information. If Recipient is required to provide Information to any court or government agency pursuant to written court order, subpoena, regulation or process of law, Recipient must first provided Discloser with prompt written notice of such requirement and cooperate with Discloser to appropriately protect against or limit the scope of such disclosure. To the fullest extent permitted by law, Recipient will continue to protect as confidential and proprietary all Information disclosed in response to a written court order, subpoena, regulation or process of law.
- 10.5 Equitable Relief. Recipient acknowledges and agrees that any breach or threatened breach of this Agreement is likely to cause Discloser irreparable harm for which money damages may not be an appropriate or sufficient remedy. Recipient therefore agrees that Discloser or its Affiliates, as the case may be, are entitled to receive injunctive or other equitable relief to remedy or prevent any breach or threatened breach of this Agreement. Such remedy is not the exclusive remedy for any breach or threatened breach of this Agreement, but is in addition to all other rights and remedies available at law or in equity.
- 10.6 Survival of Confidentiality Obligations. The parties' rights and obligations under this Section 10 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.

11. Assignments

Any assignment by either Party to any non-affiliated entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void, and such consent shall not be unreasonably withheld. A Party may assign this Agreement or any right, obligation, duty or other interest hereunder to an Affiliate company of the Party without the consent of the other Party. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations.

12. Resolution of Disputes

Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

13. Taxes

13.1 Definition. For purposes of this Section, the terms “taxes” and “fees” shall include but not limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

13.2 Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party.

13.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.

13.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.

13.3 Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party.

- 13.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.
- 13.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.
- 13.3.3 If the purchasing Party determines that in its opinion any such taxes or fees are not payable, the providing Party shall not bill such taxes or fees to the purchasing Party if the purchasing Party provides written certification, reasonably satisfactory to the providing Party, stating that it is exempt or otherwise not subject to the tax or fee, setting forth the basis therefor, and satisfying any other requirements under applicable law. If any authority seeks to collect any such tax or fee that the purchasing Party has determined and certified not to be payable, or any such tax or fee that was not billed by the providing Party, the purchasing Party may contest the same in good faith, at its own expense. In any such contest, the purchasing Party shall promptly furnish the providing Party with copies of all filings in any proceeding, protest, or legal challenge, all rulings issued in connection therewith, and all correspondence between the purchasing Party and the taxing authority.
- 13.3.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.
- 13.3.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.
- 13.3.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.
- 13.3.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

13.4 Taxes and Fees Imposed on Providing Party But Passed On To Purchasing Party.

- 13.4.1 Taxes and fees imposed on the providing Party, which are permitted or required to be passed on by the providing Party to its customer, shall be borne by the purchasing Party.
- 13.4.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.
- 13.4.3 If the purchasing Party disagrees with the providing Party's determination as to the application or basis for any such tax or fee, the Parties shall consult with respect to the imposition and billing of such tax or fee. Notwithstanding the foregoing, the providing Party shall retain ultimate responsibility for determining whether and to what extent any such taxes or fees are applicable, and the purchasing Party shall abide by such determination and pay such taxes or fees to the providing Party. The providing Party shall further retain ultimate responsibility for determining whether and how to contest the imposition of such taxes and fees; provided, however, that any such contest undertaken at the request of the purchasing Party shall be at the purchasing Party's expense.
- 13.4.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.
- 13.4.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.
- 13.4.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other reasonable charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.
- 13.4.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

- 13.5 Mutual Cooperation. In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.

14. Force Majeure

In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Customer, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

15. Network Maintenance and Management

- 15.1 The Parties shall work cooperatively to implement this Agreement. The Parties shall exchange appropriate information (e.g., maintenance contact numbers, network information, information required to comply with law enforcement and other security agencies of the Government, etc.) as reasonably required to implement and perform this Agreement.
- 15.2 Each Party hereto shall design, maintain and operate their respective networks as necessary to ensure that the other Party hereto receives service quality which is consistent with generally accepted industry standards at least at parity with the network service quality given to itself, its Affiliates, its End Users or any other Telecommunications Carrier.
- 15.3 Neither Party shall use any service or facility provided under this Agreement in a manner that impairs the quality of service to other Telecommunications Carriers' or to either Party's End Users. Each Party will provide the other Party notice of any such impairment at the earliest practicable time.
- 15.4 BellSouth agrees to provide NewSouth prior notice consistent with applicable FCC rules and the Act of changes in the information necessary for the transmission

and routing of services using BellSouth's facilities or networks, as well as other changes that affect the interoperability of those respective facilities and networks. This Agreement is not intended to limit BellSouth's ability to upgrade its network through the incorporation of new equipment, new software or otherwise so long as such upgrades are not inconsistent with BellSouth's obligations to NewSouth under the terms of this Agreement.

16. Modification of Agreement

- 16.1 BellSouth shall make available, pursuant to 47 USC § 252(i), and the FCC rules and regulations and Court Orders regarding such availability, to NewSouth any interconnection, service, or network element provided under any other agreement filed and approved pursuant to 47 USC § 252 (e).
- 16.2 If NewSouth changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of NewSouth to notify BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.
- 16.3 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.
- 16.4 Execution of this Agreement by either Party does not confirm or infer that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).
- 16.5 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of NewSouth or BellSouth to perform any material terms of this Agreement, NewSouth or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 12.
- 16.6 If any provision of this Agreement, or the application of such provision to either Party or circumstance, shall be held invalid, the remainder of the Agreement, or the application of any such provision to the Parties or circumstances other than those to which it is held invalid, shall not be effective thereby, provided that the Parties shall attempt to reformulate such invalid provision to give effect to such portions thereof as may be valid without defeating the intent of such provision.

17. Waivers

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

18. Governing Law

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia, without regard to its conflict of laws principles.

19. Arm's Length Negotiations

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

20. Notices

- 20.1 Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered in person or given by postage prepaid mail, address to:

BellSouth Telecommunications, Inc.

CLEC Account Team
9th Floor
600 North 19th Street
Birmingham, Alabama 35203

and

General Attorney - COU
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

NewSouth Communications, Corp.

Senior Vice President
of Network Planning & Provisioning
NewSouth Center
Two N. Main Street
Greenville, SC 29601

and

Vice President of Regulatory Affairs
NewSouth Center
Two N. Main Street
Greenville, SC 29601

or at such other address as the intended recipient previously shall have designated by written notice to the other Party.

20.2 Where specifically required, notices shall be by certified or registered mail. Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

20.3 BellSouth shall provide NewSouth notice via Internet posting of price changes and of changes to the terms and conditions of services available for resale.

21. Rule of Construction

No rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.

22. Headings of No Force or Effect

The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

23. Multiple Counterparts

This Agreement may be executed multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document.

24. Implementation of Agreement

If NewSouth is a facilities based provider or a facilities based and resale provider, this section shall apply. Within 60 days of the execution of this Agreement, the Parties will adopt a schedule for the implementation of the Agreement. The schedule shall state with specificity time frames for submission of including but not limited to, network design, interconnection points, collocation arrangement requests, pre-sales testing and full operational time frames for the business and residential markets. An implementation template to be used for the implementation schedule is contained in Attachment 10 of this Agreement.

25. Filing of Agreement

25.1 Provided that NewSouth is certified as a CLEC in all applicable states, upon execution of this Agreement it shall be filed with the appropriate state regulatory agency pursuant to the requirements of Section 252 of the Act. If the regulatory agency imposes any filing or public interest notice fees regarding the filing or approval of the Agreement, NewSouth shall be responsible for publishing the required notice and the publication and/or notice costs shall be borne by NewSouth.

25.2 For electronic filing purposes in the State of Louisiana, the CLEC Louisiana Certification Number is required and must be provided by NewSouth prior to execution of the Agreement. The CLEC Louisiana Certification Number for NewSouth is TSP00231.

26. Changes In Subscriber Carrier Selection

26.1 Both Parties hereto shall apply all of the principles set forth in 47 C.F.R. § 64.1100 to the process for End User selection of a primary Local Exchange Carrier. BellSouth shall not require a disconnect order from an NewSouth Customer or another LEC in order to process an NewSouth order for Resale Service for an NewSouth End User. Until the FCC or the Commission adopts final rules and procedures regarding a Customer's selection of a primary Local Exchange Carrier, unless already done so, NewSouth shall deliver to BellSouth a Blanket Representation of Authorization that applies to all orders submitted by NewSouth under this Agreement that require a primary Local Exchange Carrier change. Both Parties hereto shall retain on file all applicable documentation of authorization, including letters of authorization, relating to their End User's selection as its primary Local Exchange Carrier, which documentation shall be available for inspection by the other Party hereto upon reasonable request during normal business hours.

26.2 If an End User denies authorizing a change in his or her primary Local Exchange Carrier selection to a different local exchange carrier ("Unauthorized Switching"), the Party receiving the End User complaint shall switch or caused to be switched that End User back to his preferred carrier in accordance with Applicable Law.

27. Additional Fair Competition Requirements

- 27.1 In the event that either Party transfers facilities or other assets to an Affiliate which are necessary to comply with its obligations under this Agreement, the obligations hereunder shall survive and transfer to such Affiliate.
- 27.2 BellSouth shall allow local exchange customers of NewSouth to select BellSouth for the provision of intraLATA toll services on a nondiscriminatory basis; provided, however, that prior to establishment of BellSouth as the intraLATA toll carrier for NewSouth local exchange customers, the Parties shall negotiate a billing and collections agreement on commercially reasonable terms whereby NewSouth shall bill the customer on BellSouth's behalf and shall collect from the customer and remit to BellSouth intraLATA toll revenues. NewSouth agrees to bill its customers on BellSouth's behalf for both presubscribed and "dial around" intraLATA toll traffic. The Parties shall exchange customer record data on a timely basis as necessary to bill such customers for intraLATA toll usage.
- 27.3 BellSouth shall not use information derived from providing services or facilities to NewSouth to create a lead or other information base for a "winback" sales program.

28. Operational Support Systems (OSS) Rates

BellSouth has developed and made available the following mechanized systems by which NewSouth may submit LSRs electronically.

LENS Local Exchange Navigation System
EDI Electronic Data Interchange
TAG Telecommunications Access Gateway
RoboTAG

or such other mechanical systems BellSouth may support for LSRs

LSRs submitted by means of one of these interactive interfaces will incur an OSS electronic ordering charge as specified in the Table below. An individual LSR will be identified for billing purposes by its Purchase Order Number (PON). LSRs submitted by means other than one of these interactive interfaces (mail, fax, courier, etc.) will incur a manual order charge as specified in the table below:

OPERATIONAL SUPPORT SYSTEMS (OSS) RATES	<u>Electronic</u> Per LSR received from the CLEC by one of the OSS interactive interfaces	Manual Per LSR received from the CLEC by means other than one of the OSS interactive interfaces
OSS LSR Charge	\$3.50	\$19.99
USOC	SOMECS	SOMAN

Note: In addition to the OSS charges, applicable discounted service order and related discounted charges apply per the tariff.

28.1 Denial/Restoral OSS Charge

In the event NewSouth provides a list of customers to be denied and restored, rather than an LSR, each location on the list will require a separate PON and, therefore will be billed as one LSR per location.

28.2 Cancellation OSS Charge

NewSouth will incur an OSS charge for an accepted LSR that is later canceled by NewSouth.

Note: Supplements or clarifications to a previously billed LSR will not incur another OSS charge.

28.3 Threshold Billing Plan (Resale and Number Portability only)

The Parties agree that NewSouth will incur the mechanized rate for all LSRs, both mechanized and manual, if the percentage of mechanized LSRs to total LSRs meets or exceeds the threshold percentages shown below:

Year	Ratio: Mechanized/Total LSRs
2000	80%
2001	90%

The threshold plan will be discontinued in 2002.

BellSouth will track the total LSR volume for each CLEC for each quarter. At the end of that time period, a Percent Electronic LSR calculation will be made for that quarter based on the LSR data tracked in the LCSC. If this percentage exceeds the threshold volume, all of that CLEC's future manual LSRs will be billed at the mechanized LSR rate. To allow time for obtaining and analyzing the data and updating the billing system, this billing change will take place on the first day of the second month following the end of the quarter (e.g. May 1 for 1Q, Aug 1 for 2Q, etc.). There will be no adjustments to the amount billed for previously billed LSRs.

28.4 Network Elements and Other Services Manual Additives

The Commissions in some states have ordered per-element manual additive non-recurring charges (NRC) for Network Elements and Other Services ordered by means other than one of the interactive interfaces. These ordered Network Elements and Other Services manual additive NRCs will apply in these states, rather than the charge per LSR. The per-element charges are listed on the Rate Tables in Attachment 2 of this agreement.

29. Entire Agreement

This Agreement and its Attachments, incorporated herein by this reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

This Agreement may include attachments with provisions for the following services:

Network Elements and Other Services
Local Interconnection
Resale
Collocation

The following services are included as options for purchase by NewSouth. NewSouth shall elect said services by written request to its Account Manager if applicable.

Optional Daily Usage File (ODUF)
Enhanced Optional Daily Usage File (EODUF)
Access Daily Usage File (ADUF)
Line Information Database (LIDB) Storage
Centralized Message Distribution Service (CMDS)
Calling Name (CNAM)

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year above first written.

BellSouth Telecommunications, Inc.

NewSouth Communications, Corp.

Signature

Signature

Greg Follensbee

Jake E. Jennings

Name

Name

Senior Director

Vice President of Regulatory Affairs

Title

Title

Date

Date

Definitions

Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term “own” means to own an equity interest (or equivalent thereof) of more than 10 percent.

Centralized Message Distribution System is the Telcordia (formerly BellCore) administered national system, based in Kansas City, Missouri, used to exchange Exchange Message Interface (EMI) formatted data among host companies.

Commission is defined as the appropriate regulatory agency in each of BellSouth’s nine state region, Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

Daily Usage File is the compilation of messages or copies of messages in standard Exchange Message Interface (EMI) format exchanged from BellSouth to a CLEC.

Exchange Message Interface is the nationally administered standard format for the exchange of data among the Exchange Carriers within the telecommunications industry.

Information Service means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Intercompany Settlements (ICS) is the revenue associated with charges billed by a company other than the company in whose service area such charges were incurred. ICS on a national level includes third number and credit card calls and is administered by Telcordia (formerly BellCore)’s Calling Card and Third Number Settlement System (CATS). Included is traffic that originates in one Regional Bell Operating Company’s (RBOC) territory and bills in another RBOC’s territory.

Intermediary function is defined as the delivery of traffic from NewSouth; a CLEC other than NewSouth or another telecommunications carrier through the network of BellSouth or NewSouth to an end user of NewSouth; a CLEC other than NewSouth or another telecommunications carrier.

Local Interconnection is defined as 1) the delivery of local traffic to be terminated on each Party’s local network so that end users of either Party have the ability to reach end users of the other Party without the use of any access code or substantial delay in the processing of the call; 2) the LEC network features, functions, and capabilities set forth in this Agreement; and 3) Service Provider Number Portability sometimes referred to as temporary telephone number portability to be implemented pursuant to the terms of this Agreement.

Local Traffic is defined in Attachment 3.

Message Distribution is routing determination and subsequent delivery of message data from one company to another. Also included is the interface function with CMDS, where appropriate.

Multiple Exchange Carrier Access Billing (“MECAB”) means the document prepared by the Billing Committee of the Ordering and Billing Forum (“OBF”), which functions under the auspices of the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions (“ATIS”) and by Telcordia (formerly BellCore) as Special Report SR-BDS-000983, Containing the recommended guidelines for the billing of Exchange Service access provided by two or more LECs and/or CLECs or by one LEC in two or more states within a single LATA.

Network Element is defined to mean a facility or equipment used in the provision of a telecommunications service. Such term may include, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. BellSouth offers access to the Network Elements, unbundled loops; network interface device; sub-loop elements; local switching; transport; tandem switching; operator systems; signaling; access to call-related databases; dark fiber as set forth in Attachment 2 of this Agreement.

Non-Intercompany Settlement System (NICS) is the Telcordia (formerly BellCore) system that calculates non-intercompany settlements amounts due from one company to another within the same RBOC region. It includes credit card, third number and collect messages.

Percent of Interstate Usage (PIU) is defined as a factor to be applied to terminating access services minutes of use to obtain those minutes that should be rated as interstate access services minutes of use. The numerator includes all interstate “non-intermediary” minutes of use, including interstate minutes of use that are forwarded due to service provider number portability less any interstate minutes of use for Terminating Party Pays services, such as 800 Services. The denominator includes all “non-intermediary”, local, interstate, intrastate, toll and access minutes of use adjusted for service provider number portability less all minutes attributable to terminating Party pays services.

Percent Local Usage (PLU) is defined as a factor to be applied to intrastate terminating minutes of use. The numerator shall include all “non-intermediary” local minutes of use adjusted for those minutes of use that only apply local due to Service Provider Number Portability. The denominator is the total intrastate minutes of use including local, intrastate toll, and access, adjusted for Service Provider Number Portability less intrastate terminating Party pays minutes of use.

Revenue Accounting Office (RAO) Status Company is a local exchange company/alternate local exchange company that has been assigned a unique RAO code. Message data exchanged among RAO status companies is grouped (i.e. packed) according to From/To/Bill RAO combinations.

Service Control Points (“SCPs”) are defined as databases that store information and have the ability to manipulate data required to offer particular services.

Signal Transfer Points (“STPs”) are signaling message switches that interconnect Signaling Links to route signaling messages between switches and databases. STPs enable the exchange of Signaling System 7 (“SS7”) messages between switching elements, database elements and STPs. STPs provide access to various BellSouth and third party network elements such as local switching and databases.

Signaling links are dedicated transmission paths carrying signaling messages between carrier switches and signaling networks. Signal Link Transport is a set of two or four dedicated 56 kbps transmission paths between NewSouth designated Signaling Points of Interconnection that provide a diverse transmission path and cross connect to a BellSouth Signal Transfer Point.

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telecommunications Act of 1996 (“Act”) means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47, U.S.C. Section 1 et. seq.).

3.5.7 If there is a dispute as to whether BellSouth must provide Packet Switching , such dispute will be resolved according tot the dispute resolution process set forth in Section 12 of the General Terms and Conditions of this Agreement, incorporated herein by this reference.

4. Enhanced Extended Link (EEL)

4.1 For purposes of this Section, references to “Already Combined” network elements shall mean that such network elements are in fact already combined by BellSouth in the BellSouth network to provide service to a particular end user at a particular location.

4.2 Where necessary to comply with an effective FCC and/or State Commission order, or as otherwise mutually agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link (“EEL”) as defined in Section 4.3 below.

4.2.2 Subject to Section 4.2.3 below, BellSouth will provide access to the EEL in the combinations set forth in 4.3 following. This offering is intended to provide connectivity from an end user’s location through that end user’s SWC to NewSouth’s POP serving wire center. The circuit must be used for the purpose of provisioning telecommunications services, including telephone exchange service, to NewSouth’s end-user customers. Except as provided for in paragraph 22 of the FCC’s Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 (“June 2, 2000 Order”), the EEL will be connected to NewSouth’s facilities in NewSouth’s collocation space at the POP SWC. NewSouth may purchase BellSouth’s access facilities between NewSouth’s POP and NewSouth’s collocation space at the POP SWC.

4.2.3 BellSouth shall provide EEL combinations to NewSouth in the state of Georgia regardless of whether or not such EELs are Already Combined. In all other states, BellSouth shall make available to NewSouth those EEL combinations described in Section 4.3 below only to the extent such combinations are Already Combined.

4.2.4 BellSouth will make available EEL combinations to NewSouth in density Zone 1, as defined in 47 C.F.R. 69.123 as of January 1, 1999, in the Miami, Orlando, Fort Lauderdale, Charlotte, New Orleans, Greensboro and Nashville MSAs, regardless of whether or not such EELs are Already Combined.

4.2.5 Additionally, BellSouth shall make available to NewSouth a combination of an unbundled loop and tariffed special access interoffice facilities. To the extent NewSouth will require multiplexing functionality in connection with such combination, BellSouth will provide access to multiplexing within the central office pursuant to the terms, conditions and rates set forth in its Access Services Tariffs. The combination of an unbundled loop and tariffed special access interoffice facilities and any associated

tariffed services, including but not limited to multiplexing, shall not be eligible for conversion to UNEs as described in Section 4.5 below. Where multiplexing functionality is required in connection with loop and transport combinations, such multiplexing will be provided at the rates and on the terms set forth in this Agreement.

4.3 EEL Combinations

- 4.3.1 DS1 Interoffice Channel + DS1 Channelization + 2-wire VG Local Loop
- 4.3.2 DS1 Interoffice Channel + DS1 Channelization + 4-wire VG Local Loop
- 4.3.3 DS1 Interoffice Channel + DS1 Channelization + 2-wire ISDN Local Loop
- 4.3.4 DS1 Interoffice Channel + DS1 Channelization + 4-wire 56 kbps Local Loop
- 4.3.5 DS1 Interoffice Channel + DS1 Channelization + 4-wire 64 kbps Local Loop
- 4.3.6 DS1 Interoffice Channel + DS1 Local Loop
- 4.3.7 DS3 Interoffice Channel + DS3 Local Loop
- 4.3.8 STS-1 Interoffice Channel + STS-1 Local Loop
- 4.3.9 DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop
- 4.3.10 STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop
- 4.3.11 2-wire VG Interoffice Channel + 2-wire VG Local Loop
- 4.3.12 4-wire VG Interoffice Channel + 4-wire VG Local Loop
- 4.3.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop
- 4.3.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop

4.4 Other Network Element Combinations

In the state of Georgia, BellSouth shall make available to NewSouth, in accordance with Section 4.6 below: (1) combinations of network elements other than EELs that are Already Combined; and (2) combinations of network elements other than EELs that are not Already Combined but that BellSouth ordinarily combines in its network. In all other states, BellSouth shall make available to NewSouth, in accordance with Section 4.5 below, combinations of network elements other than EELs only to the extent such combinations are Already Combined.

4.5 Special Access Service Conversions

4.5.1 NewSouth may not convert special access services to combinations of loop and transport network elements, whether or not NewSouth self-provides its entrance facilities (or obtains entrance facilities from a third party), unless NewSouth uses the combination to provide a “significant amount of local exchange service” (as described in Section 4.5.2 below), in addition to exchange access service, to a particular customer. Such conversions of existing special access services pursuant to this section may include facilities within a single density zone (as described in 47 C. F. R. 69.123) or across Density Zones.

4.5.1.2 For the purpose of special access conversions under Section 4.5.1, a “significant amount of local exchange service” is as defined in the FCC’s June 2, 2000 Order. The Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 Order. When NewSouth requests conversion of special access circuits, NewSouth will self-certify to BellSouth in the manner specified in paragraph 29 of the June 2, 2000 Order that the circuits to be converted qualify for conversion. In addition there may be extraordinary circumstances where NewSouth is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in paragraph 22 of June 2, 2000 Order, or under a fourth option set forth below in Section 4.5.2. In such case, NewSouth may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order. If a waiver is granted, then upon NewSouth’s request the Parties shall amend this Agreement to the extent necessary to incorporate the terms of such waiver for such extraordinary circumstance.

4.5.1.3 The recurring charges for such combinations shall be the sum of the recurring charge for the applicable UNE loop and transport segments (including multiplexing, if applicable), as set forth in Exhibit C to this Attachment. The nonrecurring charges for such combinations shall be an amount equal to all applicable conversion charges set forth in Exhibit C to this Attachment for conversion of special access circuits to EELs, plus all applicable nonrecurring cross connect charges (set forth in Attachment 4 to this Agreement) required to connect the facility to NewSouth’s collocation arrangement. EELs that terminate in NewSouth collocation arrangements may be connected by NewSouth via cross-connects to BellSouth services used by NewSouth to transport traffic between NewSouth’s collocation space and NewSouth’s POP.

4.5.1.4 Upon request for conversions of up to 15 circuits from special access to EELs, BellSouth shall perform such conversions within seven (7) days from BellSouth’s receipt of a valid, error free service order from NewSouth. Requests for conversions of fifteen (15) or more circuits from special access to EELs will be provisioned on a project basis. Except as set forth in Section 4.5.3 below, conversions should not require the special access circuit to be disconnected and reconnected because only the billing information or other administrative information associated with the circuit will change when NewSouth requests a conversion. Submission of a spreadsheet

identifying the circuits to be converted shall serve as a substitute for submission of a local service request (LSR), only until such time as the LSR process is modified to accommodate such requests.

- 4.5.1.5 BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.
- 4.5.2 In addition to the circumstances under which NewSouth may identify special access circuits that qualify for conversions to EELs (referenced in Section 4.5.1.2 above), NewSouth also shall be entitled to convert special access circuits to unbundled network elements pursuant to the terms of this section 4.5.2 et seq.
 - 4.5.2.1 Upon request by NewSouth, BellSouth will convert special access circuits to combinations of an unbundled loop connected to special access transport provided that: (1) the combination terminates to a NewSouth collocation arrangement; and (2) NewSouth certifies, in the manner set forth in Section 4.5.2 above, that at least 75% of the unbundled network element(s) component of the facility is used to provide originating and terminating local voice traffic. The recurring charges for such combinations shall be the sum of the recurring charge for the applicable UNE loop, as set forth in Exhibit C to this Attachment, and all applicable recurring charges for the special access transport facility, as set forth in the BellSouth tariff under which such facilities were ordered. The nonrecurring charges for such combinations shall be an amount equal to all applicable conversion charges set forth in Exhibit C to this Attachment for conversion of special access circuits to EELs, plus the applicable nonrecurring cross connect charges (set forth in Attachment 4 to this Agreement) required to connect the facility to NewSouth's collocation arrangement. Such combinations that terminate in NewSouth collocation arrangements may be connected by NewSouth via cross-connects to BellSouth services used by NewSouth to transport traffic between NewSouth's collocation space and NewSouth's POP.
 - 4.5.2.2 Upon request from NewSouth to convert special access circuits pursuant to Section 4.5.2, BellSouth shall have the right, upon 10 business days notice, to conduct an audit prior to any such conversion to determine whether the subject facilities meet local usage requirements set forth in Section 4.5.2. An audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive

months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order, except as expressly modified herein.

- 4.5.3 In consideration of Section 4.5.2.1 above, and subject to Section 4.5.7 below, for those special access circuits identified by NewSouth in writing as of January 19, 2001 as being eligible for conversion pursuant to the terms of this Agreement, BellSouth will provide to NewSouth a credit in an amount equal to three times the difference between the monthly special access rates for such circuits and the monthly rates for the combinations to which those circuits are converted.
- 4.5.3.1 For circuits converted pursuant to one of the three options made available to NewSouth in Section 4.5.1, the credit will be in an amount equal to three times the difference between the monthly special access rates for such circuits and the monthly UNE recurring charges for the loop, transport and multiplexing (if applicable), as set forth in Exhibit C to this Attachment, that, in combination, form an EEL.
- 4.5.3.2 For circuits converted pursuant to the fourth option made available to NewSouth in Section 4.5.2, the credit will be in an amount equal to three times the difference between the monthly special access rates for such circuits and the sum of the monthly UNE recurring charges for the loop, as set forth in Exhibit C to this Attachment, and the monthly recurring charge for the special access transport facility, as set forth in the BellSouth tariff under which such facility was ordered.
- 4.5.3.3 Such credits will be applied to NewSouth's bill within sixty (60) days following execution of this Agreement.
- 4.5.3.4 Within ten (10) days following execution of this Agreement, NewSouth shall certify to BellSouth in writing that the circuits designated as of January 19, 2001 meet significant local use requirements of one of the four conversion options set forth above. Such certification shall include a designation by NewSouth of which of the particular four conversion options specified herein is applicable to each of the individual circuits designated as of January 19, 2001.
- 4.5.3.5 BellSouth shall assign a project management team and designate a project manager to facilitate the timely conversion of special access circuits. BellSouth and NewSouth will participate in a joint implementation meeting within fifteen (15) days following execution of this Agreement, or within 15 days of any subsequent request for conversion, to establish a schedule for conversion of the identified special access circuits. BellSouth shall complete conversions of all circuits identified by NewSouth as of January 19, 2001 within 3 months of the joint implementation meeting, unless an alternative completion date is agreed to by the Parties. For purposes of conversion of the circuits identified by NewSouth as of January 19, 2001, NewSouth's spreadsheet identifying the circuits to be converted shall serve as a substitute for submission of a local service request (LSR). For subsequent conversion requests pursuant to Sections 4.5.1 and 4.5.2 above, submission of a spreadsheet identifying the circuits to be

converted shall serve as a substitute for submission of a local service request (LSR), only until such time as the LSR process is modified to accommodate such requests.

- 4.5.4 For all special access circuits converted under this Agreement, NewSouth shall pay BellSouth any termination charges applicable to the special access circuits converted, as specified in BellSouth's tariffs.
- 4.5.5 The Parties acknowledge that the conversion option described in Section 4.5.2 and the credits offered NewSouth in Section 4.5.3 constitute a reasonable negotiated alternative to those developed by the FCC in the June 2, 2000 Order. However, BellSouth has agreed to the terms of Sections 4.5.2 and 4.5.3 based upon the assumption that the FCC's current rules regarding special access conversions will remain in effect throughout the 2001 calendar year. In the event that the FCC modifies its rules regarding conversion of special access circuits in a manner that is inconsistent with BellSouth's stated position on the issue, then BellSouth cannot realize the value of the alternative option made available to NewSouth hereunder. In the event that the FCC rules regarding special access conversions are modified in the manner described herein with an effective date prior to January 1, 2002, NewSouth will reimburse BellSouth one-seventh of the credits extended to NewSouth under Section 4.5.3 above for each month or portion thereof prior to January 1, 2002, that such modified FCC rules are in effect.
- 4.6 Rates
 - 4.6.1 Georgia
 - 4.6.1.1 The non-recurring and recurring rates for the EEL Combinations of network elements set forth in 4.3, whether Already Combined or new, are as set forth in this Attachment.
 - 4.6.1.2 On an interim basis, for combinations of loop and transport network elements not set forth in Section 4.3, where the elements are not Already Combined but are ordinarily combined in BellSouth's network, the non-recurring and recurring charges for such UNE combinations shall be the sum of the stand-alone non-recurring and recurring charges of the network elements which make up the combination. These interim rates shall be subject to true-up based on the Commission's review of BellSouth's cost studies.
 - 4.6.1.3 To the extent that NewSouth seeks to obtain other combinations of network elements that BellSouth ordinarily combines in its network which have not been specifically priced by the Commission when purchased in combined form, NewSouth, at its option, can request that such rates be determined pursuant to the Bona Fide Request/New Business Request (NBR) process set forth in this Agreement.
 - 4.6.2 All Other States
 - 4.6.2.1 Subject to Section 4.2.3 and 4.4 preceding, all other states, the rates for (1) Already Combined EEL combinations set forth in Section 4.3, and (2) other combinations of network elements that are Already Combined in the network will be the sum of the

recurring rates for the individual network elements plus a nonrecurring charge as specified in Exhibit C of this Attachment.

- 4.6.2.2 Rates for new EEL combinations in Density Zone 1 in the Miami, Orlando, Fort Lauderdale, Charlotte, New Orleans, Greensboro and Nashville MSAs shall be as set forth in Exhibit C hereto; provided, however, that to the extent a rate is not established in Exhibit C, the rate shall be the sum of the recurring and nonrecurring charges for the individual network elements as set forth in Exhibit C to this Attachment, unless otherwise established by the Commission.

5. Port/Loop Combinations

- 5.1 For purposes of this Section, references to “Already Combined” network elements shall mean that such network elements are in fact already combined by BellSouth in the BellSouth network to provide service to a particular end user at a particular location. For purposes of this Section, “soft dial tone” (i.e., where network elements are connected through from the end user premises to the BellSouth end office and no dispatch is required to initiate service) shall be considered “Already Combined”.
- 5.2 At NewSouth’s request, BellSouth shall provide access to combinations of port and loop network elements, as set forth in Section 5.5 below, that are Already Combined in BellSouth’s network except as specified in Sections 5.2.1 and 5.2.2 below, consistent with the requirements of 47 C.F.R. 315(b) and all applicable FCC and Commission rules and policies.
- 5.2.1 BellSouth shall not provide access to combinations of unbundled port and loop network elements in locations where, pursuant to FCC rules, BellSouth is not required to provide circuit switching as an unbundled network element.
- 5.2.2 In accordance with effective and applicable FCC rules, BellSouth shall not provide unbundled circuit switching in density Zone 1, as defined in 47 C.F.R. 69.123 as of January 1, 1999, of the Atlanta, Miami, Orlando, Fort Lauderdale, Charlotte, New Orleans, Greensboro and Nashville MSAs to NewSouth if NewSouth’s customer has 4 or more DS0 equivalent lines.
- 5.3 Combinations of port and loop network elements provide local exchange service for the origination or termination of calls. BellSouth shall make available the following loop and port combinations at the terms and at the rates set forth below:
- 5.3.2.1 In Georgia, BellSouth shall provide to NewSouth combinations of port and loop network elements to NewSouth on an unbundled basis regardless of whether or not such combinations are Currently Combined except in those locations where BellSouth is not required to provide circuit switching, as set forth in Section 5.2.2 above. The rates for such combinations shall be the cost based rates set forth in Exhibit C of this Attachment.



BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Executive Director

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

April 26, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Jake:

NewSouth has requested BellSouth to convert numerous special access circuits to Unbundled Network Elements (UNEs). Pursuant to those request, BellSouth has converted many of those circuits in accordance with BellSouth procedures. Some of the circuits were not converted due to various reasons, (e.g., previously disconnected, duplicates, etc.).

Consistent with the FCC Supplemental Order Clarification, Docket No. 96-98, BellSouth has selected an independent third party, American Consultants Alliance (ACA), to conduct an audit. The purpose of this audit is to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order.

In the Supplemental Order Clarification, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated:

"We clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements."

Accompanying this letter, please find a Confidentiality and Non-Disclosure Agreement on proprietary information and Attachment A, which provides a list of the information ACA needs from NewSouth.

NewSouth is required to maintain appropriate records to support local usage and self-certification. ACA will audit NewSouth's supporting records to determine compliance of

NewSouth
April 26, 2002
Page 2

each circuit converted with the significant local usage requirements of the Supplemental Order.

In order to minimize disruption of NewSouth's daily operations and conduct an efficient audit, ACA has assigned senior auditors who have expertise in auditing, special access circuit records and the associated facilities, minutes of use traffic studies, CDR records recorded at the switch for use in billing, and Unbundled Network Elements.

BellSouth will pay for American Consultants Alliance to perform the audit. In accordance with the Supplemental Order, NewSouth is required to reimburse BellSouth for the audit if the audit uncovers non-compliance with the local usage options on 20% or more of the circuits audited. This is consistent with established industry practice for jurisdictional report audits. BellSouth hopes that in the event circuits are found to be non-compliant, the parties can reach agreement as to the appropriate remedy; however, in the event that the parties cannot, in accordance with the interconnection agreements, BellSouth will seek dispute resolution from the appropriate Commission(s). BellSouth will seek reimbursement for the cost of the audit and will seek to convert the circuits back to special access for the appropriate non-recurring charges for the special access services. In addition, BellSouth will seek reimbursement for the difference between the UNE charges paid for those circuits since they were converted and the special access charges that should have applied.

Per the Supplemental Order, BellSouth is providing at least 30 days written notice that we desire the audit to commence on May 27, 2002 at NewSouth's office in Greenville or another NewSouth location as agreed to by both parties. Our experience in other audits has indicated that it typically takes two weeks to complete the review. Thus, we request that NewSouth plan for ACA to be on-site for two weeks. Our audit team will consist of 3 auditors and an ACA partner in charge.

NewSouth will need to supply conference room arrangements at your facility. Our auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.). It is desirable to have a pre-audit conference next week with your lead representative. Please have your representative call Shelley Walls at (404) 927-7511 to schedule a suitable time for the pre-audit planning call.

BellSouth has forwarded a copy of this notice to the FCC, as required in the Supplemental Order. This allows the FCC to monitor implementation of the interim requirements for the provision of unbundled loop-transport combinations.

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,

Jerry D. Hendrix
Executive Director

NewSouth
April 28, 2002
Page 3

Enclosures

cc: Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May, FCC (via electronic mail)
Andrew Caldarello, BellSouth (via electronic mail)
Larry Fowler, ACA (via electronic mail)
Sr. Vice President of Network Planning & Provisioning, NewSouth (via U.S. mail)

ATTACHMENT A

NewSouth
April 28, 2002

**Audit to Determine the Compliance Of Circuits Converted by NewSouth
From BellSouth's Special Access Tariff to Unbundled Network Elements
With The FCC Supplemental Order Clarification, Docket No. 96-98**

Information to be Available On-site May 27, 2002

Prior to the audit, ACA or BellSouth will provide NewSouth the circuit records as recorded by BellSouth for the circuits requested by NewSouth that have been converted from BellSouth's special access services to unbundled network elements. These records will include the option under which NewSouth self-certified that each circuit was providing a significant amount of local exchange service to a particular customer, in accordance with the FCC's Supplemental Order Clarification.

Please provide:

NewSouth's supporting records to determine compliance of each circuit converted with the significant local usage requirements of the Supplemental Order Clarification.

First Option: NewSouth is the end user's only local service provider.

- ☐ Please provide a Letter of Agency or other similar document signed by the end user, or
- ☐ Please provide other written documentation for support that NewSouth is the end user's only local service provider.

Second Option: NewSouth provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- ☐ Please provide the total traffic and the local traffic separately identified and measured as a percent of total end user customer local dial tone lines.
- ☐ For DS1 circuits and above please provide total traffic and the local voice traffic separately identified individually on each of the activated channels on the loop portion of the loop-transport combination.
- ☐ Please provide the total traffic and the local voice traffic separately identified on the entire loop facility.
- ☐ When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Third Option: NewSouth provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- ☐ Please provide the number of activated channels on a circuit that provide originating and terminating local dial tone service.

ATTACHMENT A

NewSouth
April 26, 2002

- ☐ Please provide the total traffic and the local voice traffic separately identified on each of these local dial tone channels.
- ☐ Please provide the total traffic and the local voice traffic separately identified for the entire loop facility.
- ☐ When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Depending on which one of the three circumstances NewSouth chose for self certification, other supporting information may be required.



May 3, 2002

Via Overnight Mail

Mr. Jerry Hendrix
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

RE: EEL Audit

Dear Jerry:

I am receipt of your April 26, 2002 letter notifying NewSouth of BellSouth's intent to audit special access circuits that have been converted to unbundled loop/transport combinations ("Enhanced Extended Links - EELs"). NewSouth is willing to work with BellSouth in order to facilitate the audit of NewSouth's special access circuits converted to EELs subject to the requirements set forth in the Federal Communications Commission's Supplemental Order Clarification, Docket No. 96-98, adopted May 19, 2000 and released, June 2, 2000 ("Supplemental Order").

As you point out in your April 26, 2002 letter, it is BellSouth's obligation to "hire and pay for" the independent auditor unless it is determined that NewSouth is non-complaint with the Supplemental Order. NewSouth disagrees with BellSouth's interpretation of the Supplement Order requiring NewSouth to pay for the audit if NewSouth is non-compliant with the "local usage options on 20% or more of the audited circuits." There is no such requirement listed in the FCC's Supplemental Order. NewSouth is willing to discuss the cost of the audit based on a finding of non-compliance, if such discussions are warranted. To the extent that we are unable to reach agreement concerning the final disposition of the audit, NewSouth will seek appropriate relief through the Dispute Resolution Process of the BellSouth/NewSouth Interconnection Agreement, dated May 18, 2001.

In addition, in the Supplemental Order, order at para. 32 states the FCC "emphasize(s) that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records, and find that, in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business." Therefore, NewSouth will provide the BellSouth audit team with only those records that are kept in the normal course of business. To the extent that BellSouth's audit places undue financial burden on NewSouth, we hereby notify BellSouth of our intent to seek reimbursement of reasonable costs and expenses imposed by this audit.

NewSouth Communications Corporation
Two North Main Street, Greenville, South Carolina 29601
Telephone: 864-672-5000 // Facsimile: 864-672-5105
www.newsouth.com



NewSouth sees no need to execute the proposed BellSouth Confidentiality and Non-Disclosure Agreement attached to your April 26, 2002 letter. Instead, NewSouth recommends that we utilize the confidentiality provisions set forth in Section 10, General Terms and Conditions – Part B of the BellSouth/NewSouth Interconnection Agreement dated May 18, 2002.

In order to facilitate the audit of NewSouth's special access circuits "converted" to EELs, I have assigned John Fury, Manager of Carrier Relations to act as a single point of contact for the BellSouth audit team. Mr. Fury can be reached at 864-672-5064 to discuss the audit. We will contact BellSouth to schedule a pre-audit conference call.

Sincerely,

A handwritten signature in black ink, appearing to read "Jake E. Jennings". The signature is fluid and stylized, with a long horizontal stroke at the end.

Jake E. Jennings
Vice President - Regulatory Affairs
NewSouth Communications Corp.

cc: Kyle D. Dixon, FCC (via electronic mail)
Matthew Brill, FCC (via electronic mail)
Daniel Gonzalez, FCC (via electronic mail)
Jordan Goldstein, FCC (via electronic mail)
Dorothy Attwood, FCC (via electronic mail)
Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May, FCC (via electronic mail)
Andrew Caldarello, BellSouth (via electronic mail)
Larry Fowler, BellSouth (via electronic mail)
John Fury, NewSouth (via electronic mail)
Amy Gardner, NewSouth (via electronic mail)

NewSouth Communications Corporation
Two North Main Street, Greenville, South Carolina 29601
Telephone: 864-672-5000 // Facsimile: 864-672-5105
www.newsouth.com



May 23, 2002

Via overnight and Electronic Mail

Mr. Jerry Hendrix
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30375

RE: EEL Audit

Dear Jerry:

Based upon new information and further consideration, NewSouth formally disputes BellSouth's request to audit special access circuits that have been converted to unbundled loop/transport combinations ("Enhanced Extended Links - EELs"). To the extent that we are unable to reach agreement concerning the final disposition of the audit, and BellSouth still insists on having one, BellSouth should seek appropriate relief through the Dispute Resolution Process of the BellSouth/NewSouth Interconnection Agreement, dated May 18, 2001. NewSouth, too, may seek regulatory agency involvement as a means of resolving this issue.

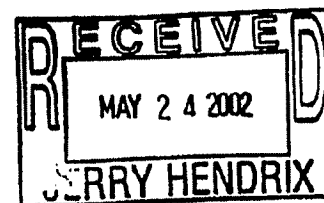
As you now may be aware, the Federal Communications Commission's Supplemental Order Clarification Order, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order") clearly stated that (1) audits may not be routine and only be conducted under limited circumstances;¹ and (2) audit must be performed by an independent third party hired and paid for by the incumbent local exchange company.² Based on information recently discovered by NewSouth - much of it included in the Petition for Declaratory Rulemaking of NuVox, Inc. filed in FCC Docket 96-98 on May 17, 2002, it is NewSouth's opinion that neither of these requirements has been met.

Indeed, just as BellSouth failed to state a reasonable "concern" regarding compliance with respect to NuVox, it also has failed to do so with NewSouth in its April 26, 2002 letter. Moreover, NewSouth understands that BellSouth's audit request to NewSouth is one of at least a dozen - demonstrating BellSouth's defiance of the FCC's directive (and its own prior commitment) that such audits will not be routine.

¹ Supplemental Order Clarification, para. 31, n. 86.

² Supplemental Order Clarification, para. 31.

NewSouth Communications
Two North Main Street
Greenville, SC 29601
864-672-5000



NewChoice. NewTechnology. NewValue.

Although I initially accepted BellSouth's assertion that its selected auditor is independent, the allegations in the NuVox petition compel me to reject that assertion now, as I have been able to confirm that the same auditor has been hired to conduct the audits of both NuVox's and NewSouth's records. If BellSouth wishes to renew its audit request, NewSouth insists that a new and truly independent auditor be selected if it is determined that such an audit is warranted. NewSouth remains willing to discuss these and several other unresolved issues regarding BellSouth's audit request. However, until these threshold issues are resolved to NewSouth's satisfaction or resolved by the FCC, NewSouth is unwilling to devote precious resources toward the proposed unauthorized audit of NewSouth's converted EEL circuits.

Sincerely,



Jake E. Jennings
Vice President - Regulatory Affairs
NewSouth Communications Corp.

cc: Kyle Dixon, FCC (via electronic mail)
Matthew Brill, FCC (via electronic mail)
Daniel Gonzalez, FCC (via electronic mail)
Jordan Goldstein, FCC (via electronic mail)
Dorothy Attwood, FCC (via electronic mail)
Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May (via electronic mail)

NewSouth Communications
Two North Main Street
Greenville, SC 29601
864-672-5000



BellSouth Interconnection Services

675 West Peachtree N.E.
34S91
Atlanta, Georgia 30375

Jerry Hendrix
(404) 927-7503
Fax: (404) 529-7839

June 6, 2002

Jake E. Jennings
Vice President - Regulatory Affairs
NewSouth Communications Corp.
Two North Main Street
Greenville, SC 29601

Dear Jake:

This is in response to your letters of May 3rd and 23rd regarding BellSouth's audit of special access circuits converted to EELs.

Let me start by stating that BellSouth intends to pursue its right to audit NewSouth's converted EELs, those EELs ordered new under Attachment 2, Section 4.2.3, and any standalone special access circuits converted to UNEs consistent with the Parties' Confidential Settlement Agreement.

You are correct that the FCC's Supplemental Order Clarification Order states that: (1) audits will not be routine but will only be conducted under limited circumstances (i.e., when the ILEC has a concern that the local usage requirements are not being met); and (2) audits must be performed by an independent third party hired and paid for by the incumbent local exchange company. BellSouth has met both of these conditions. BellSouth does not audit EELs on a routine basis, rather it request audits only when it believes such an audit is warranted due to a concern that the local usage options may not be met. The fact that BellSouth may be conducting several audits currently is no indication that the audits are routine. In fact, BellSouth has not conducted any EEL audits in the two years since the Supplemental Order Clarification was released, and BellSouth is not requesting audits of any CLEC unless there is a concern as to compliance with the FCC's rules.

You are also **correct** that BellSouth did not state the reason for its desire to audit NewSouth circuits in its **initial** audit request. BellSouth has no obligation to disclose its reason for requesting the audit. However, BellSouth requested the NewSouth audit for two reasons. First, BellSouth records indicate that NewSouth has misreported its PIU/PLU factors in the past. In addition, and more importantly, NewSouth's traffic in Tennessee is primarily interstate (non-local) traffic according to BellSouth's records, yet NewSouth has represented to BellSouth that the traffic on its 280 EEL circuits in Tennessee, in large part, is local.

The auditor is an independent third party, who has no affiliation with BellSouth. Simply because BellSouth may be auditing other CLECs using the same third party auditor does not change the status of the auditor or BellSouth's affiliation with such auditor, or does it imply that any such audits are routine.

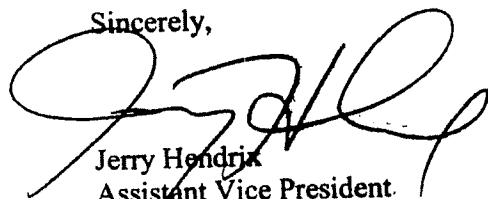
In regard to NewSouth's disagreement of the 20% threshold, you are correct that the Supplemental Clarification Order ("the Order") does not specify a 20% threshold finding of non-compliance to shift the burden for payment to NewSouth. In fact, per the language of the Order, there is no threshold level of non-compliance that must be met for the CLEC to become responsible for the cost of the audit. The Order provides that "incumbent LECs requesting an audit hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options." Therefore, any non-compliance would trigger the reimbursement obligation. However, to allow for unintentional errors, BellSouth has established a reasonable threshold under which no reimbursement will be necessary. In other contexts, BellSouth and NewSouth use a threshold of 20% as a reasonable standard. PIU audits described in BellSouth's tariffs specify the 20% threshold (see tariff attached). Further, the parties' Interconnection Agreement states that the party requesting the PIU or PLU audit will be responsible for the cost of the audit unless the audited party is found to have misstated the PIU or PLU in excess of 20% (see Attachment 3, Section 5.4). We believe such a proposal is reasonable and consistent with industry practice. Whether NewSouth agrees with this position should not affect whether NewSouth proceeds with the audit. BellSouth is the party responsible for paying the auditor, and reimbursement from NewSouth, if applicable, has no effect on whether the audit occurs in the first place. Unless non-compliance is found, this will be a moot issue.

Consistent with the May 9th meeting, I believe that your concerns about having to produce documents that would cause a financial burden on NewSouth have been resolved. All parties were in agreement that the documents used in NewSouth's normal course of business would be sufficient for purposes of the audit. Providing these records should not place an undue financial burden on NewSouth.

The Non-Disclosure Agreement ("NDA") that was sent was solely as protection to NewSouth. BellSouth is agreeable to proceeding under the confidentiality provisions set forth in the interconnection agreement rather than the NDA.

I trust that the foregoing has sufficiently responded to each of your issues and concerns. If you have any additional questions, please do not hesitate to contact me.

Sincerely,



Jerry Hendrix
Assistant Vice President
Interconnection Services

CC: Kyle Dixon, FCC (via electronic mail)
Matthew Brill, FCC (via electronic mail)
Jordan Goldstein, FCC (via electronic mail)
Dorothy Attwood, FCC (via electronic mail)
Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May, FCC (via electronic mail)

BELLSOUTH TELECOMMUNICATIONS, INC.
BY: Operations Manager – Pricing
29657, 675 W. Peachtree St., N.E.
Atlanta, Georgia 30375
ISSUED: NOVEMBER 1, 1996

TARIFF F.C.C. NO. 1
5TH REVISED PAGE 2-18.1
CANCELS 4TH REVISED PAGE 2-18.1
EFFECTIVE: DECEMBER 16, 1996

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.3 Obligations of the Customer (Cont'd)

2.3.10 Jurisdictional Report Requirements (Cont'd)

(D) Audit Results for BellSouth SWA

- (1) Audit results will be furnished to the customer via Certified U.S. Mail (return receipt requested). The Telephone Company will adjust the customer's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the quarter the audit is completed, the usage for the quarter prior to completion of the audit, and the usage for the two (2) quarters following the completion of the audit. After that time, the customer may report a revised PIU pursuant to (A) preceding. If the revised PIU submitted by the customer represents a deviation of 5 percentage points or more, from the audited PIU, and that deviation is not due to identifiable reasons, the provisions in (B) preceding may be applied.
- (2) Both credit and debit adjustments will be made to the customer's interstate access charges for the specified period to accurately reflect the interstate usage for the customer's account consistent with Section 2.4.1 following.
- (3) If, as a result of an audit conducted by an independent auditor, a customer is found to have over-stated the PIU by 20 percentage points or more, the Telephone Company shall require reimbursement from the customer for the cost of the audit. Such bill(s) shall be due and paid in immediately available funds 30 days from receipt and shall carry a late payment penalty as set forth in Section 2.4.1 following if not paid within the 30 days.



BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Assistant Vice President

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

June 27, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Jake:

This letter is to follow up on my June 6 letter to you. I attempted in that letter to address all the expressed concerns of NewSouth with the audit of NewSouth's EELs and standalone special access circuits converted to EELs. As you have not responded, I assume that NewSouth is agreeable to proceeding with the audit immediately. ACA's audit team will commence the audit at New South's offices in Greenville on July 15. We expect that the audit will take two weeks to complete. Thus, we request that NewSouth plan for ACA to be on-site for two weeks. Our audit team will consist of 3 auditors and an ACA partner in charge.

Please supply conference room arrangements at your facility. The auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.).

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Hendrix", written over the typed name and title.

Jerry D. Hendrix
Assistant Vice President

cc: Larry Fowler, ACA (via electronic mail)
Sr. Vice President of Network Planning & Provisioning, NewSouth (via U.S. mail)



Via Electronic and Overnight Delivery

Mr. Jerry Hendrix
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree St., NE
Room 34S91
Atlanta, GA 30375

Dear Jerry,

This letter is in response to your letters of June 6 and June 27, 2002 regarding, as you state in the opening line of your June 6, 2002 letter, "BellSouth's **audit of special access circuits converted to EELs**" (emphasis added). As an initial matter, I wish to point out that BellSouth has no right to audit new EELs ordered or any standalone UNE loops currently in use by NewSouth, as the FCC's use restrictions do not apply to them and FCC Rule 51.309 (a) affirmatively prohibits BellSouth from imposing use restrictions on UNEs.

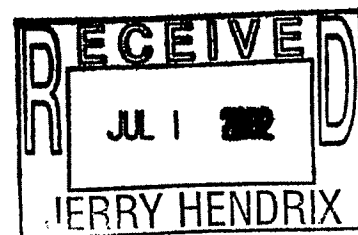
Let me further state that your assumption that NewSouth is agreeable to proceeding with the proposed audit immediately is not correct. In addition to failing to satisfy NewSouth's concerns on the threshold issues identified in NewSouth's May 23, 2002 letter, you have now added a new issue that requires resolution prior to commencement of the audit - scope.

With regard to the issue of whether BellSouth is seeking to conduct "routine" audits in violation of the FCC's *Supplemental Order Clarification*, NewSouth now views this as a legal issue currently pending before the FCC in CC Docket No. 96-98. NewSouth has followed the proceedings related to the NuVox Petition with great interest. In particular, we have reviewed BellSouth's Opposition and ex parte filings and remain convinced that BST had commenced a series of routine audits in violation of the FCC's order. NewSouth will file comments in that docket as scheduled further setting forth our views on this issue.

With respect to the FCC's requirement that BellSouth not undertake any audit but for a "concern" regarding compliance with the safe harbors, NewSouth finds your assertion that BellSouth need not disclose the concern to be contrary to the FCC's *Supplemental Order Clarification*. Now, with respect to BellSouth's alleged concern, NewSouth requests that BellSouth provide substantiation for both aspects of its allegations. If BellSouth has concerns regarding NewSouth's PIU/PLU reporting in Tennessee, it has requested the wrong type of audit. If BellSouth intends to audit converted EELs outside Tennessee, please provide substantiation for your concerns in those states as well.

With respect to the independent status of the proposed auditor, NewSouth also views this as a legal matter pending before the FCC. If BellSouth were willing to replace its selected auditor with one without such predominant ILEC affiliations, NewSouth would welcome that change and would gladly consider the qualifications of a new auditor that does not have such obvious conflicts of interest. Otherwise, NewSouth believes it wasteful to argue the merits repeatedly in different fora and will submit its views on BellSouth's assertions regarding the independent status of ACA in comments that will be filed with the FCC next week.

NewSouth Communications Corporation
Two North Main St., Greenville, SC 29601
Telephone: 864-672-5000 // Facsimile: 864-672-5105
www.newsouth.com

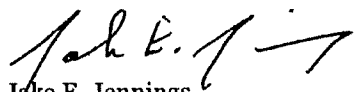


NewChoice. NewTechnology. NewValue.

Finally, NewSouth will accept BellSouth's proposed 20% noncompliance threshold for shifting reasonable costs of any audit of converted EEL circuits that may eventually be conducted. NewSouth considers this to be a good faith gesture as well as an invitation to BellSouth to consider some compromises of its own. Absent a significant change in position by BellSouth – on many fronts – I fear that we will not be able to resolve this dispute amicably.

I trust that the foregoing has refocused your attention on NewSouth's concerns regarding BellSouth's proposed audit. Please do not hesitate to contact me if and when you believe additional discussions on this matter would be useful.

Sincerely,

A handwritten signature in black ink, appearing to read "Jake E. Jennings", with a stylized flourish at the end.

Jake E. Jennings
Vice President – Regulatory Affairs
NewSouth Communications

CC: Larry Fowler, BellSouth (Electronic Mail)
Amy Gardner, NewSouth (Electronic Mail)
John Heitman, Kelley Drye (Electronic Mail)



BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Assistant Vice President

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

July 17, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Jake:

This letter is in response to your June 29 letter.

Contrary to the assertions made in your letter, BellSouth has the right to audit new EELs converted from special access as well as converted EELs. BellSouth has made every effort not only to comply with the provisions of NewSouth's Interconnection Agreement regarding audits, but also to comply with all the FCC's rules regarding audits, even though the parties did not incorporate all such requirements into the Interconnection Agreement. In addition, BellSouth has offered to NewSouth conditions and restrictions above and beyond any found in the Agreement or the FCC rules, such as the 20% threshold for requiring reimbursement of the audit cost. Contrary to your assertion that NewSouth's acceptance of the 20% threshold is a good faith gesture on NewSouth's part, it is actually a good faith gesture of BellSouth's. We were hoping that NewSouth would act in good faith as well, but apparently that is not the case.

As for your specific complaints regarding the audit, first, the FCC's safe harbors apply to all EELs, although much of the discussion took place in the context of conversions. The FCC was concerned that "...permitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations..." (paragraph 7 the Supplemental Order Clarification). Paragraph 8 goes on to state that the FCC defined the safe harbors so that, "until we resolve the issues in the Fourth FNPRM, IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." A UNE combination could be used to substitute for special access services whether or not it is ordered as new or is converted.

NewSouth
July 17, 2002
Page 2 of 3

Regardless, the Interconnection Agreement clearly applies the Supplemental Order Clarification to new EELs. Section 4.2.2 of Attachment 2, which discusses new EELs, says,

Subject to Section 4.2.3 below, BellSouth will provide access to the EEL in the combinations set forth in 4.3 following. This offering is intended to provide connectivity from an end user's location through that end user's SWC to NewSouth's POP serving wire center. The circuit must be used for the purpose of provisioning telecommunications services, including telephone exchange services, to NewSouth's end-user customers. *Except as provided for in paragraph 22 of the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order")*, the EEL will be connected to NewSouth's facilities in NewSouth's collocation space at the POP SWC. NewSouth may purchase BellSouth's access facilities between NewSouth's POP and NewSouth's collocation space at the POP SWC.
(emphasis added)

If the FCC's Order did not apply to new EELs, there would be no need to carve out an exception for option 3 of the safe harbors.

Second, as you are aware, the parties agreed in the discussions surrounding the Confidential Settlement Agreement that the standalone loops converted pursuant to that Agreement would be subject to the safe harbors. BellSouth agreed to NewSouth's proposed language on that subject in an effort to bring closure to the complaint. In that same spirit of compromise, BellSouth will drop the converted standalone loops from the audit and would appreciate NewSouth reciprocating with some substantive compromise.

In my June 6 letter, I asked that you contact me regarding any additional questions NewSouth had after I had addressed the issues you had raised in your May 23 letter. In the absence of any information from NewSouth to indicate what concerns might remain regarding those issues, BellSouth could only assume that NewSouth had no concern and was agreeable to the audit.

Your assertion that the issue of whether or not BellSouth is conducting "routine" audits is an open matter before the FCC is incorrect. The FCC is seeking comment on Nuvox's Petition for a Declaratory Ruling, but that Petition does not even ask the FCC to find that BellSouth is conducting routine audits. To the extent that it addresses this issue at all, it requests that the FCC specifically require an auditing carrier to notify the carrier to be audited of "a specific, bona fide and legitimately related concern regarding the requesting CLEC's conforming with local usage criteria" at the time notification for an audit is provided. BellSouth has done so with NewSouth.

Your letter asks for substantiation of BellSouth's concerns. First, BellSouth has had issues with NewSouth in the past regarding its ability to appropriately jurisdictionalize traffic it sends to BellSouth. In light of those past difficulties, it is more than reasonable to question NewSouth's self-certification of the amount of local traffic on the circuits in question. Second, traffic studies show that NewSouth's traffic in several states is largely non-local. In South Carolina, 75% of all NewSouth's traffic is local; in Louisiana, only 66% of NewSouth's and 0% of Universal Communications' traffic is local; in North

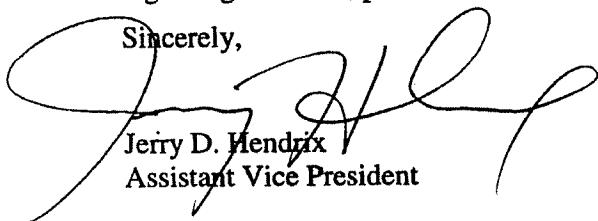
NewSouth
July 17, 2002
Page 3 of 3

Carolina, just 45% is local; and in Tennessee, only 38% of all NewSouth's traffic is local. Yet, NewSouth is claiming that, on these circuits, the traffic mix is substantially different than the statewide average. This is particularly a cause for concern for circuits that were certified under the fourth option negotiated into NewSouth's Interconnection Agreement, which requires that 75% of all the traffic on a circuit is local. There are currently 68 such circuits in North Carolina, 86 in South Carolina, and 106 in Tennessee. It is reasonable and efficient to audit the circuits even in those states where this does not appear to be the case while the auditor is available and on-site. In addition, your agreement is a nine-state, regional agreement. It does not require that the audits be conducted on a state-by-state basis, nor do the FCC rules contain such a requirement.

Your claim that the independence of the specific auditor BellSouth has is an open matter before the FCC is also incorrect. The Nuvox Petition asks that the FCC institute new rules regarding the information to be provided regarding the auditor at the time notice of the audit is given. The fact that the FCC is considering Nuvox's request has no bearing on the rules in place today, which do not require the parties to agree to the auditor. BellSouth has complied with the FCC's Supplemental Order Clarification and has hired an independent auditor. If, based on the results of the audit, NewSouth suspects some impropriety on the part of the auditor, it may dispute the auditor's findings and may assert and attempt to prove that the auditor is not independent. At this point, there is no legitimate basis for objecting to ACA. If NewSouth seriously considers prior employment at an ILEC to automatically establish bias against CLECs, then perhaps it should more carefully examine its own staff.

I sincerely hope that our companies can amicably resolve any issues that remain within the next few days, or at least agree that any potential differences are more properly addressed after the audit in the event that they become an issue. In the event that NewSouth does not begin to cooperate with the audit as required by the Interconnection Agreement, BellSouth will have no choice but to interpret it as a material breach of contract and will be forced to take the appropriate steps. If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511.

Sincerely,



Jerry D. Hendrix
Assistant Vice President

cc: Larry Fowler, ACA (via electronic mail)
Sr. Vice President of Network Planning & Provisioning, NewSouth (via U.S. mail)



August 7, 2002

Sent Via Electronic and US Mail

Mr. Jerry Hendrix
BellSouth Interconnection Services
675 West Peachtree St., NE
Room 34S91
Atlanta, GA 30375

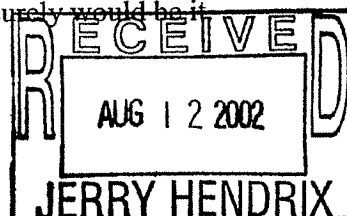
Dear Jerry:

This letter is in response to your July 17, 2002 letter.

Please allow me to start by pointing out your own confusion as BellSouth tries to segue into its newly minted and unlawful policy of trying to impose use restrictions on new EELs in addition to those converted from special access. You open your letter with: "Contrary to the assertions made in your letter, BellSouth has the right to audit new EELs converted from special access as well as converted EELs." We agree that BellSouth has a limited right to audit EELs converted from special access. To avoid confusion, however, we do not refer to them as "new EELs". We reserve that moniker for new combinations made available pursuant to various state commission orders and not on account of FCC Rule 315(b) and the temporary use restrictions appended to conversions from special access that the FCC adopted in the *Supplemental Order* and *Supplemental Order Clarification*.

Next, you assert that BellSouth has offered "conditions and restrictions above and beyond any found in the Agreement and the FCC rules." We agree with this assertion, and therein lies much of your problem. While we have come to an agreement on the 20% noncompliance threshold for requiring reimbursement of audit expenses, we simply do not agree to BellSouth's attempt to go "above and beyond" the limited audit rights afforded to it under the *Supplemental Order Clarification* and the Agreement.

Closing out my response to your first paragraph, allow me to note that I do not take your accusation that NewSouth has not acted in "good faith" lightly. NewSouth certainly has acted in good faith. Indeed, we have expended far too many resources simply exchanging letters with you on this matter. Nevertheless, we are committed to investing in the business relationship we have with BellSouth and will continue to express a preference for dialogue and compromise over rhetoric and litigation. Nevertheless, I do note that by your own admission, BellSouth has attempted to go "above and beyond" its limited right to audit and, if anything in our companies' discourse on this issue could be considered to be in bad faith, that surely would be it.



NewSouth Center • Two N. Main Street
Greenville, South Carolina 29601
T:(864)-672-5000 • F:(864)-672-5055

NewChoice. NewTechnology. NewValue.

Moving to the more substantive assertions made in your letter, let me state plainly that your assertion that “the FCC’s safe harbors apply to all EELs” is wrong. Indeed, the FCC declined to address new combinations in its *UNE Remand, Supplemental Order*, and *Supplemental Order Clarification*. Thus, the temporary use restrictions adopted in the latter two orders apply solely to special access-to-EEL conversions. Moreover, neither those restrictions nor any aspect of them apply to stand-alone UNEs. BellSouth’s attempt to extend the FCC-imposed use restrictions is unlawful, as FCC rules strictly prohibit an ILEC from imposing *any* use restrictions.

I also object to your proposed misinterpretation of the interconnection agreement. The language you reference was added because BellSouth sought to add a collocation requirement as a condition for EEL availability, in general. NewSouth agreed to the collocation requirement but wanted to preserve the option of using safe harbor number three, which, for certain conversions from special access to EELs, does not require collocation. The language of Section 4.2.2 of Attachment 2, clearly reflects that this is the case. In short, the reference to paragraph 22 of the *Supplemental Order Clarification* serves simply to indicate that there is an exception to the collocation condition that NewSouth graciously agreed to. The exception is for special access circuits converted to EELs under safe harbor option three.

Notably, the Agreement does incorporate the FCC’s safe harbors in Section 4.5.1. and 4.5.1.2 which addresses special access service conversions to UNE combinations. New EELs are addressed in Sections 4.2.3 and 4.2.4 and are clearly not subject to any use restrictions.

Now, with respect to special access converted stand alone UNE loops pursuant to the Confidential Settlement Agreement, we clearly disagree. UNE loops are not subject to use restrictions. Nevertheless, since you have dropped your request to audit stand alone UNE loops, we need not spill more ink on it at this time.

As you know, NewSouth agrees with numerous other CLECs’ position that the rash of audit requests issued by BellSouth constitute a deviation from the limited audit rights granted to BellSouth by the FCC. Notably, the stream of audit requests seemed to come to a halt only after NuVox filed its Petition. While I do not believe this was a mere coincidence, I will wait for the FCC to decide.

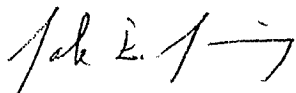
With respect to your stated concern that triggered your audit requests, I note that if BellSouth has concerns with NewSouth’s jurisdictionalization of traffic, we should identify and address those concerns separately, as such jurisdictional reporting has no bearing on the individual circuits BellSouth seeks to audit here. Now with respect to the traffic studies you mention, it seems to me that in all cases, your studies confirm that NewSouth’s traffic includes a significant amount of local traffic in each state you discuss. Your assertion that NewSouth’s traffic in several states is “largely non-local” has nothing to do with the “significant local use” restrictions imposed by the FCC on conversions of special access to EELs. Nevertheless, if you continue to believe that your traffic studies are probative of compliance, perhaps you can provide more detail about the studies (was it limited to converted EELs?, what was the timeframe during which it was

conducted?) and additional explanation regarding why you believe that they are relevant and trigger a concern regarding compliance in each state for which you have requested an audit (NewSouth will not permit BellSouth to proceed with an audit in any state where it does not have a legitimate concern regarding compliance).

Regarding the independent status of the auditor selected by BellSouth, again, we disagree. ACA does not meet the AICPA standards and cannot reasonably be deemed "independent". Neither the NuVox Petition nor NewSouth's Comments and Reply Comments in support of it contain an assertion that any ILEC employment establishes bias, as you disingenuously suggest. Your gross misrepresentation of the NuVox Petition in this regard, simply underscores that BellSouth has no legitimate basis for asserting that ACA – an ILEC consulting shop comprised of principles who have had prior careers with ILECs and now rely on a nearly all ILEC client base and who pitch their ability to generate revenues for ILECs via audits – is independent. BellSouth can and should choose an independent auditor, as required by the *Supplemental Order Clarification*.

As always, NewSouth would prefer an amicable resolution of disputes between the parties. However, we remain far apart on core issues that may best be settled by the FCC. In the meantime, NewSouth invites BellSouth to take "appropriate steps" to bring its audit request into compliance with the limitations established by the FCC. Please call or write, if you would like to discuss those steps with NewSouth.

Sincerely,



Jake E. Jennings
Vice President, Regulatory Affairs

CC: Larry Fowler, BellSouth (*Electronic Mail*)
Amy Gardner, NewSouth (*Electronic Mail*)



BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Assistant Vice President

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

September 18, 2002

VIA ELECTRONIC MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Jake:

This letter is in response to your August 7 letter.

First, please excuse the editing error. I did not intend to confuse the term "new EELs" with EELs converted from special access. Second, as I'm sure you are aware, your letter totally takes my statement that BellSouth has gone above and beyond the requirements of the Agreement and the FCC's rules out of context. BellSouth has offered NewSouth additional protections beyond what BellSouth is obligated to offer and has fully complied with its obligations under both the Interconnection Agreement and the FCC's rules.

As for not acting in good faith, NewSouth has not made any compromise at all, except to claim it is a compromise to accept BellSouth's offer of a 20% non-compliance threshold for determining responsibility for the cost of the audit. Instead NewSouth continues to throw up baseless obstacles in an apparent attempt to avoid an audit. BellSouth can only assume that NewSouth refuses to cooperate with the audit because its circuits are not in compliance with its Agreement or FCC rules. BellSouth has complied with its obligations and expects NewSouth to do the same.

I do not agree with your interpretation of Section 4.2.2 of the Interconnection Agreement, and the *Supplemental Order Clarification* did not address new EELs directly, since, as you point out, at the time new EELs were not generally available. Nonetheless, the FCC's reasoning concerning the policy issues apply to new combinations as well as conversions. There is no reason that these concerns would be limited to conversions after new EELs became available and when they can clearly be used in exactly the same manner as a conversion.

BellSouth has explained its position on its audit rights and the timing of the audits it has already initiated in its filings in response to the NuVox Petition. I do not feel it appropriate or useful to reiterate them here.

While it is certainly appropriate to deal with NewSouth's problems jurisdictionalizing its traffic on a statewide basis separately, those problems certainly, and reasonably, cast doubt on NewSouth's ability to accurately certify that specific circuits carry certain percentages of traffic. Your attempts to disassociate the two only lead me to further questions regarding NewSouth's belief in its own ability to jurisdictionalize traffic for these circuits.

The traffic studies BellSouth has examined are for terminating traffic on Feature Group D trunks across each state and the figures cited are for the month of June. While these studies clearly do not directly concern the circuits in question here, it does speak to the usage patterns of NewSouth's targeted end users. It does not stand to reason that these particular end users deviate from that pattern. For instance, in 106 cases, NewSouth has claimed that these circuits carry more than 75% local traffic – almost double the statewide average of 38%.

As I explained in my last letter, there is no limitation in the nine-state interconnection agreement or the FCC's rules that limit BellSouth's right to audit to a sub-set of NewSouth's EELs. NewSouth has no basis for attempting to insert such a restriction now.

Let me point out again that BellSouth is not required to prove that NewSouth's circuits are non-compliant prior to conducting an audit. The purpose of the audit is to determine whether or not the circuits are compliant with the local usage requirements. BellSouth has doubts and it is well within its rights under the FCC's rules and the interconnection agreement to require an audit.

I do not understand your statement that ACA does not meet AICPA standards. ACA meets all requirements for independence as defined by the AICPA Professional Standards ET Section 101 Independence. Further, the AICPA Professional Standards interpretations of the rule caution members to "...consider whether personal and business relationships between the member and the client or an individual associated with the client would lead a reasonable person aware of all the relevant facts to conclude that there is an unacceptable threat to the member's and the firm's independence." There is no personal or business relationship that has not been disclosed. There is no reason to doubt ACA's independence.

If you are referring to ACA's membership in AICPA, BellSouth does not see a need for ACA to be a member of the AICPA and perform the audit in accordance with AICPA standards and rules or have an "Agreed Upon Procedures Engagement" as defined by AICPA in order to perform this audit in a professional and independent manner. I am confident that the ACA team is staffed with personnel with expertise in special access circuits and audits. ACA will conduct an effective and efficient audit and minimize the disruption of your daily work schedules and time spent by your company in assisting with the audit. ACA will review your circuits and provide written documentation of objective data concerning the compliance of each circuit with the FCC rules. ACA will not be involved in resolution of any circuits that are not in compliance with the FCC Supplemental Order.

NewSouth
August 14, 2002
Page 3 of 3

However, if you prefer, BellSouth can instruct ACA to conduct this audit as a compliance audit and have ACA engage a CPA firm to render an opinion, based on ACA's documentation, concerning the compliance of your circuits with the FCC *Supplemental Order Clarification*. This would add additional cost to the audit with little or no benefit to your company or BellSouth since the circuits either will or will not meet the FCC's requirements.

Again, BellSouth has fully complied with its obligations under the FCC's rules and the interconnection agreement. NewSouth has so far refused to comply with its responsibilities under the interconnection agreement. BellSouth would like to settle these issues without resorting to dispute resolution procedures, but NewSouth's intransigence is not conducive to such a resolution. In fact, NewSouth has given no indication of the conditions under which it would find an audit to be within the bounds of the FCC's orders and agree to cooperate. Please let me know if NewSouth is sincerely interested in avoiding a formal complaint or if it will continue using unreasonable delay tactics so that BellSouth may respond accordingly.

Sincerely,

Jerry D. Hendrix
Assistant Vice President



BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Assistant Vice President
Interconnection Services Marketing
(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

May 21, 2003

VIA ELECTRONIC AND OVERNIGHT MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Mr. Jennings:

Since we have not received a response from you regarding our letter of September 18, 2002, BellSouth has scheduled an audit consistent with the terms of the Interconnection Agreement dated May 18, 2001.

BellSouth does not agree with NewSouth's claim, as stated in your letter of August 7, 2002, that it has not complied with the Commission's requirements regarding audits. In fact, the FCC in Docket No. 02-260 stated:

We reject NewSouth's claims that BellSouth does not comply with the Commission's requirements with EELS audits. NewSouth alleges that BellSouth has not identified a reasonable concern regarding NewSouth's compliance with EELs local usage restrictions. Based on this record, it does not appear that BellSouth's EELS audit request expressly violates a Commission rule.

Furthermore in this Docket the FCC stated that it "has found that incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options", which this is one.

BellSouth has selected an independent third party, American Consultants Alliance (ACA), to conduct an audit. The purpose of this audit is to verify NewSouth's local usage certification and compliance with the significant local usage requirements contained in the Interconnection Agreement.

Accompanying this letter, please find Attachment A, which provides a list of the information ACA needs from NewSouth. ACA will audit NewSouth's supporting

records to determine compliance of each circuit converted with the significant local usage requirements.

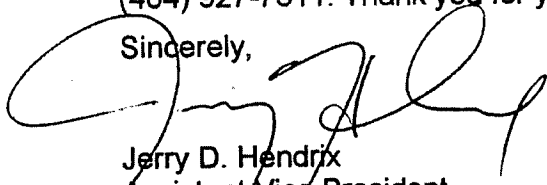
In order to minimize disruption of NewSouth's daily operations and conduct an efficient audit, ACA has assigned senior auditors who have expertise in auditing, special access circuit records and the associated facilities, minutes of use traffic studies, CDR records recorded at the switch for use in billing, and Unbundled Network Elements.

This letter shall constitute BellSouth's written notice that we desire the audit to commence on June 3, 2003 at NewSouth's office in Greenville or another NewSouth location as agreed to by both parties. We anticipate that the auditor will need approximately two weeks to complete the review. Thus, we request that NewSouth plan for ACA to be on-site for two weeks. Our audit team will consist of 3 auditors with an ACA partner in charge.

NewSouth will need to supply conference room arrangements at your facility. Our auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.). It is desirable to have a pre-audit conference next week with your lead representative. Please have your representative call Shelley Walls at (404) 927-7511 to schedule a suitable time for the pre-audit planning call.

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,



Jerry D. Hendrix
Assistant Vice President
Interconnection Services Marketing

Attachment

cc: Shelley Walls, BellSouth (via electronic mail)
Sharyn Gaston, BellSouth (via electronic mail)
Andrew Caldarello, BellSouth (via electronic mail)
Larry Fowler, ACA (via electronic mail)

ATTACHMENT A

NewSouth Communications Corp
May 21, 2003

**Audit to Determine the Compliance Of Circuits Converted by NewSouth
From BellSouth's Special Access Tariff to Unbundled Network Elements
With The Interconnection Agreement**

Information to be Available On-site June 23

Prior to the audit, ACA or BellSouth will provide NewSouth the circuit IDs as recorded by BellSouth for the EELs requested by NewSouth.

Please provide:

NewSouth's supporting records to determine compliance of each EEL with the significant local usage requirements of the Interconnection Agreement.

First Option: NewSouth is the end user's only local service provider.

- ☐ Please provide a Letter of Agency or other similar document signed by the end user, or
- ☐ Please provide other written documentation for support that NewSouth is the end user's only local service provider.

Second Option: NewSouth provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- ☐ Please provide the total traffic and the local traffic separately identified and measured as a percent of total end user customer local dial tone lines.
- ☐ For DS1 circuits and above please provide total traffic and the local voice traffic separately identified individually on each of the activated channels on the loop portion of the loop-transport combination.
- ☐ Please provide the total traffic and the local voice traffic separately identified on the entire loop facility.
- ☐ When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Third Option: NewSouth provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- ☐ Please provide the number of activated channels on a circuit that provide originating and terminating local dial tone service.
- ☐ Please provide the total traffic and the local voice traffic separately identified on each of these local dial tone channels.
- ☐ Please provide the total traffic and the local voice traffic separately identified for the entire loop facility.

ATTACHMENT A

NewSouth Communications Corp.
May 21, 2003

- ❑ When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Fourth Option: That at least 75% of the unbundled network element(s) of the facility is used to provide originating and terminating local voice traffic, and the combination terminates in a NewSouth Collocation arrangement.

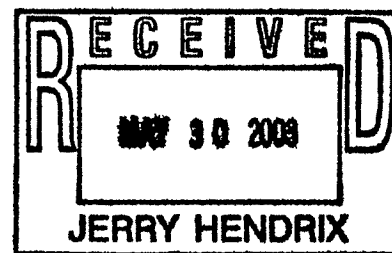
- ❑ Please provide the total traffic and the local voice traffic separately identified on each of these local dial tone channels.
- ❑ Please provide the total traffic and the local voice traffic separately identified for the entire loop facility.

Depending on which one of the four circumstances NewSouth chooses for self-certification, other supporting information may be required.



May 27, 2003

Sent Via Electronic and U. S. Certified Mail



Mr. Jerry Hendrix
BellSouth Interconnection Services
675 W. Peachtree St., NE
Room 34S91
Atlanta, GA 30375

Dear Mr. Hendrix:

This is in response to your May 21, 2003 letter in which you express a renewed interest in BellSouth's long dormant, but still unauthorized, request for an unlimited audit of NewSouth's EEL circuits.

First, I want to explain my reason for not responding to your September 18 letter earlier. Although a response to your letter was prepared last fall, I held off sending it to BellSouth because we were focused on resolving the outstanding Bill and Keep dispute between our two companies. It appears that BellSouth also allowed its audit request to stagnate. Indeed, it has been over 8 months since BellSouth's last correspondence. During that time, a number of events have occurred. Most notably, in a recent ruling, the Georgia PSC declined to approve a hearing examiner's recommendation to allow BellSouth to proceed with a similar request involving NuVox and instead ordered an evidentiary hearing on whether BellSouth's audit request with NuVox is warranted. Surprisingly, instead of awaiting the outcome of the Georgia proceeding, BellSouth has chosen to resurrect its audit request with NewSouth. It also is surprising that BellSouth's renewed zeal in pursuing its request comes at a time when it has asked the Tennessee Regulatory Authority to suspend consideration of complaints regarding additional audit requests BellSouth has served upon CLECs. Curiously, BellSouth's decision to resurrect its audit request comes on the heels of NewSouth's notice to BellSouth that it would seek mediation with the FCC regarding the untimely conversion of special access to unbundled network element pricing dispute.

NewSouth's position on this matter remains unchanged. BellSouth has no right to proceed with the audit it has requested. Further, NewSouth has no inclination to indulge BellSouth by granting its request to engage in a burdensome and unnecessary intrusion into NewSouth's business. Although this is NewSouth's "bottom line", I will endeavor to explain briefly why our position remains unchanged, despite your ever-evolving attempts to craft a legal justification for BellSouth's unlimited audit request.

In response to BellSouth's very latest attempt to find legal justification for its audit request, it should come as no surprise to you that we read the FCC's comments on WC Docket No. 02-260 differently than you do. The FCC's order did nothing more than indicate that, based on the limited record before it in the 271 proceeding, it declined to find that BellSouth's audit request constituted a per se rule or checklist violation. The FCC made no determination about whether BellSouth had violated the limits imposed such audits in the *Supplemental Order Clarification* and, instead, reminded BellSouth of the limits imposed on such audits and essentially warned BellSouth that it needed to adhere to them. Confirming that the FCC did not give BellSouth the blessing you claim, the FCC also noted that it was considering the issue of BellSouth's compliance with the FCC-imposed limits on audits in another docket.

NewSouth Center - Two N. Main Street
Greenville, South Carolina 29601
T:(864)-672-5000 - F:(864)-672-5055

NewChoice. NewTechnology. NewValue.



In your September 18, 2002 letter, BellSouth did nothing more than assume and speculate, without reasonable basis, that NewSouth is not in compliance with the local use requirements associated with circuits that have been converted from special access to EELs. Rather than going virtually line by line through that letter and explaining once again why I believe BellSouth has an incorrect view of its rights and NewSouth's obligations under FCC rules and the agreement, I reserve our right to do so at a later date. For now, however, I will simply highlight a few of the flaws in BellSouth's position. First, as you admit, the studies you cite "clearly do not directly concern the circuits in question here." Thus, I think it is fair to say that they are irrelevant. Indeed, BellSouth's FGD studies do not appear to have any relation to the end user EELs at issue. Nevertheless, even if NewSouth carried 38% local traffic, as you allege, that amount clearly constitutes a "significant amount of local traffic" under the FCC's current rules. Finally, I must confess that I do not understand why you think that ACA's failure to comply with AICPA standards should be ignored. In short, a group consultants that is *dependent* on BellSouth and other ILECs for virtually all of its revenues cannot fairly be deemed *independent*. Your dogged insistence on using that group remains one of the more curious aspects of this dispute.

NewSouth continues to take very seriously and comply fully with its obligations under the FCC's rules and the interconnection agreement. We ask that BellSouth do the same and demonstrate its commitment to doing so by terminating its unlimited audit request. However, if BellSouth wishes to pursue its request further, we are willing to engage in additional discussions so as to gain a better understanding of why BellSouth believes it is entitled to proceed with it. Then again, it may be time for us to respectfully agree to disagree on this dispute and for BellSouth to seek dispute resolution as provided for in our Interconnection Agreement. Although we would prefer that BellSouth drop its request and move on, it is certainly your call. In the meantime, please be advised that there will be no audit commencing in Greenville, or at any other NewSouth location, on June 3, 2003.

Sincerely,

A handwritten signature in black ink, appearing to read "Jake E. Jennings", with a stylized flourish at the end.

Jake E. Jennings
Senior Vice President
Regulatory Affairs & Carrier Relations

Cc: John Heitmann, Kelley, Drye & Smith (via electronic mail)

CERTIFICATE OF SERVICE

Docket No. 2004-63-C to be served on the following this February 1, 2006:

(U. S. Mail and Electronic Mail)

(U. S. Mail and Electronic Mail)

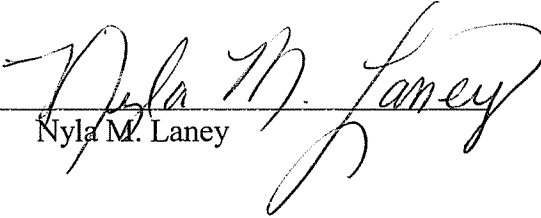
(U. S. Mail and Electronic Mail)

(U.S. Mail and Electronic Mail)

(U. S. Mail and Electronic Mail)

RECEIVED
2006 FEB -1 PM 4:09
SO PUBLIC SERVICE
COMMISSION

John J. Pringle, Jr., Esquire
Ellis Lawhorne & Sims, P.A.
1501 Main Street, 5th Floor
Columbia, South Carolina 29201
(NewSouth Communications, Corp.)
(U. S. Mail and Electronic Mail)



Nyla M. Laney

PC Docs # 529919